

LFC Requester:	Scott Sanchez
-----------------------	----------------------

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:

AgencyAnalysis.nmlegis.gov

{Analysis must be uploaded as a PDF}

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 January 28, 2024
Bill No: HB 233

Sponsor: Lujan
Short Title: Criminal Competency Determination

Agency Name and Code NM Sentencing Commission (354)
Number: _____
Person Writing Douglas Carver
Phone: 505-239-8362 **Email** dhmcarver@unm.edu

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(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						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis:

HB 233 represents a major reworking of the state’s laws on competency to stand trial, as follows:

Section 1 of the bill repeals the existing language in Section 31-9-1, concerning raising the issue of competency, and creates a new process for how to proceed once the issue of competency has been raised. Under this new scheme, the case shall be suspended, and then any of the following might happen:

- the case may be transferred for an evaluation pursuant to the process outlined in 31-9-1.1;
- the court may order the defendant to be diverted to a treatment program; or
- the court may refer the defendant for an assessment to determine if the defendant is a candidate for civil commitment or assisted outpatient treatment pursuant to the Assisted Outpatient Treatment Act.

For misdemeanor cases, a defendant may be ordered to participate in a diversion to treatment program for no longer than 6 months. If a defendant in a misdemeanor case is diverted to treatment, the case shall not transfer to District Court.

For nonviolent felony cases, the defendant could be assessed for participation in an available diversion to treatment program for no longer than 18 months; upon completion of the program, charges shall be dismissed. The 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 assigned to a diversion to treatment program refuses or is unable to comply with court-ordered treatment, the court may dismiss the charges pending against the defendant or make a referral to determine if the defendant is eligible for the civil commitment process or assisted outpatient treatment pursuant to the Assisted Outpatient Treatment Act.

Section 2 of the bill amends Section 31-9-1.1, concerning evaluations and determination of competency, by adding that competency evaluations shall include a provisional diagnosis, or full diagnosis when possible, linking symptom interference with competency capacities, as well as appropriate treatment recommendations. The bill also adds that a hearing on dangerousness is required to be held on the same day as the hearing on competency mandated by this section. The

language requiring a hearing within ten days of the court being notified that the evaluation is complete for defendants not charged with felonies has been removed.

Section 3 of the bill repeals the existing language in Section 31-9-1.2, concerning commitment of a defendant, and replaces it with new language around commitment and adds the use of competency restoration programs.

Under this new process, a court shall hold a hearing on the same day to determine whether a defendant is incompetent to proceed and on dangerousness. The court may dismiss the criminal case without prejudice or stay the case and refer the defendant to a competency restoration program. The court shall order treatment in the least restrictive setting consistent with the goal of restoration to competency.

The court may refer the defendant to an outpatient competency restoration program if 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 the case is dismissed, the defendant may be referred by any of the interested parties for assessment to civil commitment proceedings under the Mental Health and Developmental Disabilities Code. Additionally, the court may order the defendant confined for a maximum of seven days to facilitate the filing of an order referring the defendant for an assessment to determine eligibility for civil commitment.

The bill again states that the court shall 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 makes a specific finding that the defendant is dangerous, the court may order the defendant to a competency program. If committed, the defendant shall be detained by the DoH in a secure, locked facility until completion of treatment. Upon the 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. Upon release, the committing facility shall forward a discharge plan and treatment documents to the receiving provider or facility, if applicable.

A defendant shall 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.

If the secretary of health determines that DoH does not have the ability to meet the medical needs of a defendant ordered to commitment, the secretary may refuse admission of the defendant upon written certification to the committing court and the parties of the lack of ability to meet the medical needs of the defendant. The certification shall be made within 14 days of the receipt of the court's order of commitment. Within ten days of filing of certification, the court shall conduct a hearing for further disposition of the criminal case.

Section 4 of the bill amends Section 31-9-1.3, concerning 90-day review, reports, and continuing treatment, by adding a new Subsection A that requires a treatment supervisor to file an initial assessment and treatment plan and a report on the defendant's amenability to treatment to render the defendant competent to proceed with the criminal case or with diversion. The report is to be filed within 30 days of the incompetent defendant's admission to an inpatient or outpatient facility. The report is to be filed with the district court, the state and the defense. The report is

also supposed to contain an assessment of the facility's capacity to provide appropriate treatment for the defendant; and an opinion of the probability of the defendant attaining competency within a period of nine months from the date of admission.

Section 5 of the bill amends Section 31-9-1.4, concerning incompetent defendants. There is a change made to the process that occurs when someone is found incompetent and the District Court has decided to dismiss the case. Rather than the District Court having the option to refer the defendant to the District Attorney for possible initiation of proceedings under the Mental Health and Developmental Disabilities Code, the new process under the bill would be that the District Court, DoH, the state, the family, or the health care provider may refer the defendant to the District Attorney for an assessment of whether the defendant is eligible for civil commitment.

Section 6 of the bill amends one part of the process in Section 31-9-1.5, concerning evidentiary hearings. The change involves the process that occurs when the District Court finds that the defendant committed a serious felony (listed in the present statute) and enters a finding that the defendant remains incompetent to proceed and remains dangerous. At the two-year review hearing (mandated at Section 31-9-1.5(D)(4)), if the defendant is not committed or is no longer dangerous, the defendant shall be released as in present statute, but the defendant also has to have a treatment plan and case management services in place.

Section 7 of the bill amends Section 31-9-1.6, concerning hearings to determine developmental or intellectual disability. The only change is striking the definition of “developmental or intellectual disability”, which has been moved to the new definitions section (Section 8 of the bill).

Section 8 creates a definition section for the competency statutes, Section 31-9-1.7. The following terms are defined:

- competency restoration program
- dangerous [Note: this definition is in current law as part of Section 31-9-1.2 – the definition, unchanged, has been moved to this new definitions section in HB 233.]
- developmental or intellectual disability [Note: this definition is in current law as part of Section 31-9-1.6 – the definition, unchanged, has been moved to this new definitions section in HB 233.]
- discharge plan"
- diversion to treatment program
- medical needs
- nonviolent felony
- outpatient competency restoration
- provisional diagnosis
- reasonable time
- treatment program
- violent felony

Section 9 of the bill amends Section 31-9-2, concerning mental examinations, so that the state, and not the court, pays for the cost of the examination when the defendant is indigent, though the payments are still to come from court funds.

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

SIGNIFICANT ISSUES

HB 233 represents a major rewriting of the competency statutes. Statutes concerning competency were overhauled in 1993, with further substantial amendments in 1999, but aside from some updating of terms used for those with mental disabilities, they have not been amended in a quarter of a century or more.

There is a fair bit of language in the bill that is unclear. As an example, in Section 3 of the bill, the part that rewrites Section 31-9-1.2, it discusses the court holding hearings in two different manners, but it is unclear whether these are different hearings. Compare:

Subsection A. A court shall hold a hearing on the same day to determine whether a defendant is incompetent to proceed in a criminal case and whether the defendant is dangerous, and the court may dismiss the criminal case without prejudice in the interest of justice or may stay the case and refer the defendant to a competency restoration program. . .

with

Subsection C. The court shall 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 makes a specific finding that the defendant is dangerous, the court may order the defendant to a competency program.

Does the process outlined in Subsection A refer to non-felony cases, and thus C is the process for felony cases? Is the “competency program” in Subsection C different than the “competency restoration program” in Subsection A (the latter of which is a new defined term in Section 8 of the bill)?

Also in Subsection C of Section 3 of the bill, it is required that “upon the defendant's completion of treatment and the submission of a final report to the state” an order shall be entered. The entity of the state that is supposed to receive that report is not specified.

Similarly, in Section 4 of the bill, the new Subsection A of Section 31-9-1.3 mandates that the required report be filed with “the state”, without specifying which state entity is meant.

Similar to this loose use of “the state” in the examples above and elsewhere in the bill, reference is often made to “the defense”. Presumably this is intended to mean the counsel for the defendant.

In Section 6 of the bill, the added language that a defendant can only be released after a two-year review hearing “with a treatment plan and case management services in place” could lead to delays in releasing people. New Mexico is chronically underserved with treatment and service

providers for those with behavioral health challenges. It could be difficult to develop a treatment plan and getting case management services in place, as the bill requires, if there are not providers able to fulfill those tasks.

In the new definitions section, Section 8, the definition given for “violent felony” is far more limited in scope than the list found in the statute concerning earned meritorious deductions, at Section 33-2-34(L), which is the normal list used for defining violent felonies in statute. There also seems to be also inconsistency between the definition of violent felony given here and the list of serious crimes referenced in 31-9-1.4; the list at 31-9-1.4 is cross-referenced in various other parts of the competency statutes.

The new language in Section 9, amending Section 31-9-2, would read: “Where the defendant is determined to be indigent, the state shall pay for the costs of the examination from funds available to the court.” Aside from it being unclear which entity of the state would pay the examination costs – a problem noted in other sections of the bill – it is also unclear how the state would pay from court funds.

In August 2020, the NMSC published the report “Competency Assessment Results for FY 2019”. Working with New Mexico Counties, the NMSC designed a study to examine the competency process in New Mexico. NMSC received competency related events filed with the courts as well as competency evaluations from the New Mexico Behavioral Health Collaborative’s database. The report summarizes the results of NMSC’s analyses of those evaluations. The report examined metrics such as the number of competency cases by judicial district, the time it took for a competency report to be generated, custody status, types of crimes, and demographic factors. The report is available at: <https://nmsc.unm.edu/reports/2020/nm-competency-assessment-results-fy19.pdf>.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS