

HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE HEALTH AND HUMAN SERVICES COMMITTEE SUBSTITUTE FOR
HOUSE BILL 233

56TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2024

AN ACT

RELATING TO CRIMINAL PROCEDURE; PROVIDING FOR THE DETERMINATION
OF COMPETENCY; PROVIDING A PROCESS FOR RAISING THE ISSUE OF
COMPETENCY; ESTABLISHING COMPETENCY RESTORATION PROGRAMS;
REQUIRING ADDITIONAL REPORTS; PROVIDING DEFINITIONS; REQUIRING
THE STATE TO PAY FOR MENTAL EXAMINATIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 31-9-1 NMSA 1978 (being Laws 1988,
Chapter 107, Section 1 and Laws 1988, Chapter 108, Section 1,
as amended by Laws 1993, Chapter 240, Section 1 and by Laws
1993, Chapter 249, Section 1) is repealed and a new Section
31-9-1 NMSA 1978 is enacted to read:

"31-9-1. [NEW MATERIAL] DETERMINATION OF COMPETENCY--
RAISING THE ISSUE--REFERRAL TO COMPETENCY DIVERSION PROGRAMS.--

A. Whenever one of the parties or the court has a

1 good-faith basis that there is concern relating to a
2 defendant's competence in a criminal case, the case shall be
3 stayed and the court shall:

4 (1) order a competency evaluation and the
5 issue of competency may be resolved pursuant to Section
6 31-9-1.1 NMSA 1978; or

7 (2) prior to, or instead of, ordering a
8 competency evaluation:

9 (a) if the parties agree and the court
10 approves, the court may order that the defendant participate in
11 a competency diversion program; or

12 (b) if the criminal court is provided
13 documentation that the defendant was ordered to assisted
14 outpatient treatment and if the parties agree, the defendant's
15 misdemeanor or nonviolent felony case shall be dismissed with
16 prejudice.

17 B. In misdemeanor criminal cases, the parties may
18 agree, with approval of the court, that the defendant be
19 ordered to participate in a competency diversion program for no
20 longer than six months. The case shall not transfer to
21 district court if the defendant participates in a competency
22 diversion program when available.

23 C. In nonviolent felony cases, the parties may
24 agree, with approval of the court, that the defendant be
25 referred for participation in an available competency diversion

1 program for no longer than eighteen months.

2 D. A defendant charged with a violent felony is
3 ineligible for a competency diversion program.

4 E. After the time period for completion of the
5 competency diversion program has elapsed or upon notification
6 by the parties that the defendant has been ordered to assisted
7 outpatient treatment, the case shall be dismissed with
8 prejudice. The defendant shall not be required to undergo a
9 competency evaluation for the case while the defendant is
10 participating in a competency diversion program."

11 SECTION 2. Section 31-9-1.1 NMSA 1978 (being Laws 1988,
12 Chapter 107, Section 2 and Laws 1988, Chapter 108, Section 2,
13 as amended by Laws 1993, Chapter 240, Section 2 and by Laws
14 1993, Chapter 249, Section 2) is amended to read:

15 "31-9-1.1. DETERMINATION OF COMPETENCY--EVALUATION AND
16 DETERMINATION.--~~[The defendant's competency shall be~~
17 ~~professionally evaluated]~~

18 A. When either party or the court raises in good
19 faith a concern as to whether a defendant is competent to stand
20 trial and diversion is not sought by the parties, the court
21 shall order a competency evaluation, and the evaluation shall
22 be conducted by a psychologist or psychiatrist or other
23 qualified professional recognized by the district court as an
24 expert and a report shall be submitted as ordered by the court.
25 ~~[A hearing on the issue of the competency of an incarcerated~~

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1 ~~defendant charged with a felony shall be held by the district~~
2 ~~court within a reasonable time, but in no event later than~~
3 ~~thirty days after notification to the court of completion of~~
4 ~~the diagnostic evaluation. In the case of an incarcerated~~
5 ~~defendant not charged with a felony, the court shall hold a~~
6 ~~hearing and determine his competency within ten days of~~
7 ~~notification to the court of completion of the diagnostic~~
8 ~~evaluation.]~~

9 B. When the question of competency is raised in a
10 magistrate court or metropolitan court, the case shall be
11 transferred to the district court for the determination of
12 competency.

13 C. In misdemeanor cases, the court shall hold a
14 hearing to determine whether a defendant is competent to
15 proceed in a criminal case. If the defendant is:

16 (1) found competent, the stay shall be lifted
17 and the case shall be scheduled for trial or any other type of
18 hearing the court deems appropriate; or

19 (2) determined to be incompetent, the court
20 shall dismiss the criminal case without prejudice.

21 D. In felony cases, a hearing shall be held on the
22 issue of competency of an incarcerated defendant by the
23 district court within a reasonable time, but no later than
24 thirty days after notification to the court of completion of
25 the evaluation. If the defendant is not incarcerated, a

1 hearing shall be held within a reasonable time, but no later
 2 than sixty days after notification to the court of completion
 3 of the evaluation. If the evaluation report finds that the
 4 defendant is incompetent, a dangerousness hearing shall be held
 5 on the same day as the hearing on competence."

6 SECTION 3. Section 31-9-1.2 NMSA 1978 (being Laws 1988,
 7 Chapter 107, Section 3 and Laws 1988, Chapter 108, Section 3,
 8 as amended) is repealed and a new Section 31-9-1.2 NMSA 1978 is
 9 enacted to read:

10 "31-9-1.2. [NEW MATERIAL] DETERMINATION OF COMPETENCY--
 11 COMPETENCY RESTORATION PROGRAMS--COMMITMENT--REPORT.--

12 A. To determine whether the defendant is dangerous
 13 for purposes of restoration to competency, the state shall
 14 prove that if released, the defendant presents a serious threat
 15 of inflicting great bodily harm to the defendant's self or
 16 another person pursuant to Subsection A of Section 30-1-12 NMSA
 17 1978 or of violating Section 30-9-11 or 30-9-13 NMSA 1978.

18 B. If the defendant is found competent, the stay
 19 shall be lifted and the case shall be scheduled for trial or
 20 any other type of hearing the court deems appropriate.

21 C. If the defendant is determined to be incompetent
 22 and not dangerous, the court shall dismiss the criminal case
 23 without prejudice.

24 D. If the defendant is determined by the court to
 25 be incompetent and dangerous, the court shall order competency

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1 restoration in the least restrictive setting consistent with
2 the goal of restoration to competency. The court may refer the
3 defendant to a competency restoration program, which may be
4 outpatient or residential. The competency restoration program
5 may be provided by a facility that is authorized by the
6 department of health or the health care authority department.
7 Facilities and providers shall notify the court immediately if
8 services are terminated. A defendant will only be eligible for
9 community competency restoration if the court finds that the
10 placement will not pose an unreasonable risk to the health and
11 safety of the defendant or any person.

12 E. If the defendant is ineligible for community
13 competency restoration, the defendant shall be committed and
14 provided with competency restoration available to involuntarily
15 committed persons, and:

16 (1) if the defendant is committed to the New
17 Mexico behavioral health institute at Las Vegas, the defendant
18 shall be detained by the department of health in a secure,
19 locked facility until completion of competency restoration, and
20 appropriate communication shall be provided with all parties
21 listed in this subsection;

22 (2) upon the defendant's completion of
23 competency restoration and the submission of a final report to
24 the state, defense counsel and the court, the court shall enter
25 an order to transport the defendant to the appropriate county

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1 detention facility, or the district court may enter any order
 2 it deems appropriate for the continued care or treatment of the
 3 defendant by the facility or program; and

4 (3) upon release, the committing facility
 5 shall forward a discharge plan and treatment documents to the
 6 receiving provider or facility, if applicable.

7 F. Within thirty days of an incompetent defendant's
 8 admission to a facility to undergo competency restoration, the
 9 treatment supervisor shall file with the court, the state and
 10 defense counsel an initial assessment of, a plan for and a
 11 report on the defendant's amenability to render the defendant
 12 competent to proceed in a criminal case; an assessment of the
 13 facility's or program's capacity to provide appropriate
 14 competency restoration for the defendant; and an opinion as to
 15 the probability of the defendant's attainment of competency
 16 within a period of nine months from the date of the original
 17 finding of incompetency to proceed in a criminal case."

18 SECTION 4. Section 31-9-1.3 NMSA 1978 (being Laws 1988,
 19 Chapter 107, Section 4 and Laws 1988, Chapter 108, Section 4,
 20 as amended) is amended to read:

21 "31-9-1.3. DETERMINATION OF COMPETENCY--NINETY-DAY
 22 REVIEW--REPORTS--CONTINUING TREATMENT.--

23 A. Within ninety days of the entry of the order
 24 committing an incompetent defendant to the New Mexico
 25 behavioral health institute at Las Vegas to undergo [treatment]

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1 competency restoration, the district court, sitting without a
2 jury, shall conduct a hearing, unless waived by the defense,
3 and shall determine:

4 (1) whether the defendant is competent to
5 proceed in the criminal case; and, if not,

6 (2) whether the defendant is making progress
7 [~~under treatment~~] toward attainment of competency within nine
8 months from the date of the original finding of incompetency;
9 and

10 (3) whether the defendant remains dangerous as
11 that term is defined in Section [~~31-9-1.2~~] 31-9-1.7 NMSA 1978.

12 B. At least seven days prior to the ninety-day
13 review hearing, the treatment supervisor shall submit a written
14 progress report to the court, the state and the defense
15 indicating:

16 (1) the clinical findings of the treatment
17 supervisor and the facts upon which the findings are based;

18 (2) the opinion of the treatment supervisor as
19 to whether the defendant has attained competency or [~~as to~~
20 ~~whether the defendant~~] is making progress under treatment
21 toward attaining competency within nine months from the date of
22 the original finding of incompetency and whether there is a
23 substantial probability that the defendant will attain
24 competency within nine months from the date of the original
25 finding of incompetency; and

1 (3) whether the defendant is dangerous as that
 2 term is defined in Section ~~[31-9-1.2]~~ 31-9-1.7 NMSA 1978 or
 3 whether the defendant satisfies the criteria for involuntary
 4 commitment contained in the Mental Health and Developmental
 5 Disabilities Code. ~~[and~~

6 ~~(4) if the defendant is receiving medication,~~
 7 ~~information from the prescribing physician indicating the type,~~
 8 ~~the dosage and the effect of the medication on the defendant's~~
 9 ~~appearance, actions and demeanor.]~~

10 C. If the district court finds the defendant to be
 11 competent, the district court shall set the matter for trial;
 12 provided that if the defendant is in need of continued care or
 13 treatment and the supervisor of the defendant's treatment
 14 agrees to continue to provide it, the district court may enter
 15 any order it deems appropriate for the continued care or
 16 treatment of the defendant by the facility or program pending
 17 the conclusion of the criminal proceedings.

18 D. If the district court finds that the defendant
 19 is still not competent to proceed in a criminal case but that
 20 ~~[he]~~ the defendant is making progress toward attaining
 21 competency, the district court may continue or modify its
 22 original treatment order entered pursuant to Section 31-9-1.2
 23 NMSA 1978; provided that:

24 (1) the question of the defendant's competency
 25 shall be reviewed again not later than nine months from the

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1 original determination of incompetency to proceed in a criminal
2 case; and

3 (2) the [~~treatment~~] competency restoration
4 supervisor shall submit a written progress report as specified
5 in Subsection B of this section at least seven days prior to
6 such hearing.

7 E. If the district court finds that the defendant
8 is still not competent, that [~~he~~] the defendant is not making
9 progress toward attaining competency and that there is not a
10 substantial probability that [~~he~~] the defendant will attain
11 competency within nine months from the date of the original
12 finding of incompetency, the district court shall proceed
13 pursuant to Section 31-9-1.4 NMSA 1978. However, if the
14 defendant is in need of continued care and treatment and the
15 supervisor of the defendant's treatment agrees to continue to
16 provide it, the district court may enter any order it deems
17 appropriate for the continued care or treatment by the facility
18 or program pending the conclusion of the proceedings."

19 SECTION 5. Section 31-9-1.4 NMSA 1978 (being Laws 1988,
20 Chapter 107, Section 5 and Laws 1988, Chapter 108, Section 5,
21 as amended) is amended to read:

22 "31-9-1.4. DETERMINATION OF COMPETENCY--INCOMPETENT
23 DEFENDANTS.--If at any time the district court determines that
24 there is not a substantial probability that the defendant will
25 become competent to proceed in a criminal case within a

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1 reasonable period of time not to exceed nine months from the
2 date of the original finding of incompetency, the district
3 court may:

4 A. hear the matter pursuant to Section 31-9-1.5
5 NMSA 1978 within three months if the defendant is charged with
6 a felony that involves the infliction of great bodily harm on
7 another person; a felony that involves the use of a firearm;
8 aggravated arson, as provided in Section 30-17-6 NMSA 1978;
9 criminal sexual penetration, as provided in Section 30-9-11
10 NMSA 1978; or criminal sexual contact of a minor, as provided
11 in Section 30-9-13 NMSA 1978;

12 B. release the defendant from custody and dismiss
13 with prejudice the charges against him; or

14 C. dismiss the criminal case without prejudice in
15 the interest of justice. If the treatment supervisor has
16 issued a report finding that the defendant satisfies the
17 criteria for involuntary commitment contained in the Mental
18 Health and Developmental Disabilities Code, the department of
19 health shall commence proceedings pursuant to [~~Chapter 43,~~
20 ~~Article 1 NMSA 1978~~] that code, and the court may order the
21 defendant confined for a maximum of seven days to facilitate
22 preparation and initiation of a petition pursuant to [~~the~~
23 ~~Mental Health and Developmental Disabilities~~] that code. The
24 district court, the department of health, the state, the family
25 or the health care provider may refer the defendant to the

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1 district attorney for [~~possible initiation of proceedings under~~
2 ~~the Mental Health and Developmental Disabilities code~~] an
3 assessment of whether the defendant is eligible for civil
4 commitment."

5 SECTION 6. Section 31-9-1.5 NMSA 1978 (being Laws 1988,
6 Chapter 107, Section 6 and Laws 1988, Chapter 108, Section 6,
7 as amended) is amended to read:

8 "31-9-1.5. DETERMINATION OF COMPETENCY--EVIDENTIARY
9 HEARING.--

10 A. As provided for in Subsection A of Section
11 31-9-1.4 NMSA 1978, a hearing to determine the sufficiency of
12 the evidence shall be held if the case is not dismissed and if
13 the defendant is charged with a felony that involves the
14 infliction of great bodily harm on another person; a felony
15 that involves the use of a firearm; aggravated arson, as
16 provided in Section 30-17-6 NMSA 1978; criminal sexual
17 penetration, as provided in Section 30-9-11 NMSA 1978; or
18 criminal sexual contact of a minor, as provided in Section
19 30-9-13 NMSA 1978. Such hearing shall be conducted by the
20 district court without a jury. The state and the defendant may
21 introduce evidence relevant to the question of the defendant's
22 guilt of the crime charged. The district court may admit
23 hearsay or affidavit evidence on secondary matters such as
24 testimony to establish the chain of possession of physical
25 evidence, laboratory reports, authentication of transcripts

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1 taken by official reporters, district court and business
2 records and public documents.

3 B. If the evidence does not establish by clear and
4 convincing evidence that the defendant committed a felony that
5 involves the infliction of great bodily harm on another person;
6 a felony that involves the use of a firearm; aggravated arson,
7 as provided in Section 30-17-6 NMSA 1978; criminal sexual
8 penetration, as provided in Section 30-9-11 NMSA 1978; or
9 criminal sexual contact of a minor, as provided in Section
10 30-9-13 NMSA 1978, the district court shall dismiss the
11 criminal case with prejudice; however, nothing in this section
12 shall prevent the state from initiating proceedings under the
13 provisions of the Mental Health and Developmental Disabilities
14 Code, and the court may order the defendant confined for a
15 maximum of seven days to facilitate preparation and initiation
16 of a petition pursuant to that code.

17 C. If the district court finds by clear and
18 convincing evidence that the defendant committed a crime and
19 has not made a finding of dangerousness, pursuant to Section
20 31-9-1.2 NMSA 1978, the district court shall dismiss the
21 charges without prejudice. The state may initiate proceedings
22 pursuant to the provisions of the Mental Health and
23 Developmental Disabilities Code and the court may order the
24 defendant confined for a maximum of seven days to facilitate
25 preparation and initiation of a petition pursuant to that code.

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1 D. If the district court finds by clear and
2 convincing evidence that the defendant committed a felony that
3 involves the infliction of great bodily harm on another person;
4 a felony that involves the use of a firearm; aggravated arson,
5 as provided in Section 30-17-6 NMSA 1978; criminal sexual
6 penetration, as provided in Section 30-9-11 NMSA 1978; or
7 criminal sexual contact of a minor, as provided in Section
8 30-9-13 NMSA 1978 and enters a finding that the defendant
9 remains incompetent to proceed and remains dangerous pursuant
10 to Section 31-9-1.2 NMSA 1978:

11 (1) the defendant shall be detained by the
12 department of health in a secure, locked facility;

13 (2) the defendant shall not be released from
14 that secure facility except pursuant to an order of the
15 district court ~~[which]~~ that committed ~~[him]~~ the defendant or
16 upon expiration of the period of time equal to the maximum
17 sentence to which the defendant would have been subject had the
18 defendant been convicted in a criminal proceeding;

19 (3) significant changes in the defendant's
20 condition, including ~~[but not limited to]~~ trial competency and
21 dangerousness, shall be reported in writing to the district
22 court, state and defense; and

23 (4) at least every two years, the district
24 court shall conduct a hearing upon notice to the parties and
25 the department of health charged with detaining the defendant.

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1 At the hearing, the court shall enter findings on the issues of
2 trial competency and dangerousness:

3 (a) upon a finding that the defendant is
4 competent to proceed in a criminal case, the court shall
5 continue with the criminal proceeding;

6 (b) if the defendant continues to be
7 incompetent to proceed in a criminal case and dangerous
8 pursuant to Section 31-9-1.2 NMSA 1978, the court shall review
9 the defendant's competency and dangerousness every two years
10 until expiration of the period of commitment equal to the
11 maximum sentence to which the defendant would have been subject
12 had ~~[he or she]~~ the defendant been convicted in a criminal
13 proceeding; provided that if the treatment supervisor
14 recommends that the defendant be committed pursuant to the
15 Mental Health and Developmental Disabilities Code, the court
16 may at any time proceed pursuant to Subsection C of Section
17 31-9-1.4 NMSA 1978; and

18 (c) if the defendant is not committed
19 pursuant to Sections 31-9-1 through 31-9-1.5 NMSA 1978 or if
20 the court finds upon its two-year review hearing that the
21 defendant is no longer dangerous ~~[as defined in Section~~
22 ~~31-9-1.2 NMSA 1978]~~, the defendant ~~[shall]~~ may be released with
23 a treatment plan and case management services in place."

24 SECTION 7. Section 31-9-1.6 NMSA 1978 (being Laws 1997,
25 Chapter 153, Section 1, as amended) is amended to read:

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1 "31-9-1.6. HEARING TO DETERMINE DEVELOPMENTAL OR
2 INTELLECTUAL DISABILITY.--

3 A. Upon motion of the defense requesting a ruling,
4 the court shall hold a hearing to determine whether the
5 defendant has a developmental or intellectual disability as
6 defined in [~~Subsection E of this~~] Section 31-9-1.7 NMSA 1978.

7 B. If the court finds by a preponderance of the
8 evidence that the defendant has a developmental or intellectual
9 disability and that there is not a substantial probability that
10 the defendant will become competent to proceed in a criminal
11 case within a reasonable period of time not to exceed nine
12 months from the date of the original finding of incompetency,
13 then, no later than sixty days from notification to the
14 secretary of health or the secretary's designee of the court's
15 findings, the department of health shall perform an evaluation
16 to determine whether the defendant presents a likelihood of
17 serious harm to self or others.

18 C. If the department of health evaluation results
19 in a finding that the defendant presents a likelihood of
20 serious harm to self or others, within sixty days of the
21 department's evaluation, the department shall commence
22 proceedings pursuant to [~~Chapter 43, Article 1 NMSA 1978~~] the
23 Mental Health and Developmental Disabilities Code if the
24 defendant was charged with murder in the first degree, first
25 degree criminal sexual penetration, criminal sexual contact of

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1 a minor or arson in the initial proceedings, and the court
 2 presiding over the initial proceedings shall enter a finding
 3 that the respondent presents a likelihood of harm to others.

4 D. The criminal charges shall be dismissed without
 5 prejudice after the hearing pursuant to [~~Chapter 43, Article 1~~
 6 ~~NMSA 1978~~] the Mental Health and Developmental Disabilities
 7 Code or upon expiration of fourteen months from the court's
 8 initial determination that the defendant is incompetent to
 9 proceed in a criminal case.

10 [~~E. As used in this section, "developmental or~~
 11 ~~intellectual disability" means significantly subaverage general~~
 12 ~~intellectual functioning existing concurrently with deficits in~~
 13 ~~adaptive behavior. An intelligence quotient of seventy or~~
 14 ~~below on a reliably administered intelligence quotient test~~
 15 ~~shall be presumptive evidence of developmental or intellectual~~
 16 ~~disability.]"~~

17 SECTION 8. A new Section 31-9-1.7 NMSA 1978 is enacted to
 18 read:

19 "31-9-1.7. [NEW MATERIAL] DEFINITIONS.--As used in
 20 Chapter 31, Article 9 NMSA 1978:

21 A. "community competency restoration" means that
 22 when a defendant is found to be incompetent and dangerous, the
 23 defendant may be restored to competency in a residential or
 24 outpatient program in the community, as opposed to
 25 hospitalization in a state forensic hospital;

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1 B. "competency diversion program" means a program
2 that provides for diversion from the legal system directly to
3 wrap-around services, including, if needed, mental health or
4 substance abuse treatment in the community with additional
5 supportive structures such as case management;

6 C. "competency restoration program" means the
7 process of administering treatment and education related to the
8 judicial process, capacity to consult with an attorney, factual
9 and rational components of standing trial, ability to assist in
10 one's own defense and capacity to comprehend the reason for
11 punishment. A "competency restoration program" may or may not
12 be accompanied by additional treatment such as psychotropic
13 medication, psychotherapy or addiction services;

14 D. "dangerous" means that, if released, the
15 defendant presents a serious threat of inflicting great bodily
16 harm on the defendant's self, another person or the community
17 or of violating Section 30-9-11 or 30-9-13 NMSA 1978;

18 E. "developmental or intellectual disability" means
19 significantly subaverage general intellectual functioning
20 existing concurrently with deficits in adaptive behavior. An
21 intelligence quotient of seventy or below on a reliably
22 administered intelligence quotient test shall be presumptive
23 evidence of developmental or intellectual disability;

24 F. "discharge plan" means a written document
25 outlining the steps to be taken after discharge;

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1 G. "diversion to treatment program" means diversion
2 from the legal system directly to mental health or substance
3 abuse treatment in the community with additional supportive
4 structures such as case management;

5 H. "medical needs" means physical medical issues
6 that require additional medical equipment or expertise to
7 adequately treat;

8 I. "nonviolent felony" means someone who has not
9 been charged with a crime consistent with a violent felony;

10 J. "outpatient competency restoration" means that
11 when a defendant is found to be incompetent, the defendant may
12 be referred to an outpatient competency restoration program if
13 one is available to the jurisdiction under which the defendant
14 has been found incompetent;

15 K. "treatment program" means any facility or
16 program offering mental health, substance use or other medical
17 treatment; and

18 L. "violent felony" means one of the following
19 enumerated felonies: murder pursuant to Section 30-2-1 NMSA
20 1978, manslaughter pursuant to Section 30-2-3 NMSA 1978,
21 criminal sexual penetration pursuant to Section 30-9-11 NMSA
22 1978, kidnapping pursuant to Section 30-4-1 NMSA 1978, any
23 crime committed with the use of a deadly weapon or any crime
24 that causes a serious threat of inflicting great bodily harm on
25 another."

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