LFC Requester:	

AGENCY BILL ANALYSIS
2025 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:

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{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** X
Correction ___ **Substitute** ___

Date Feb. 6, 2025
Bill No: HB 4-280

Sponsor: Christine Chandler
Short Title: Criminal Competency & Treatment

Agency Name and Code Number: 280-LOPD
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	**FY26**		

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	**FY26**	**FY27**		

(Parenthesis ( ) Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: **SB 166**
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

The contents of the analysis for the original bill are retained herein and changes from the CPAC analysis are discussed with the underlined text.

BILL SUMMARY

Largely, HB 4 is consistent with the **current process** for raising, evaluating, or determining competency, and the overarching outcomes. Under current law: If a defendant is found competent to stand trial, then a case proceeds to trial. If not competent, charges for non-dangerous defendants "may be dismissed" (and no alternative to this option is explicitly provided.) If dangerous, the court temporarily "commits" defendants to NMBHI to try and "restore competency" (and thus proceed to trial) and, if unsuccessful, defendants who are not competent but are found liable (by clear and convincing evidence) for enumerated "dangerous" charges are criminally committed. Defendants who are not found "dangerous" have their criminal cases dismissed without prejudice. A prosecutor has the discretion to seek civil commitment if a criminal case is dismissed.

Maintaining this overarching framework, HB 4 would:

(1) provide an outpatient option for restoring non-dangerous defendants to competency (currently, only inpatient competency restoration is available at NMBHI for "dangerous" defendants);
(2) expand the criteria justifying dangerousness findings (both at the stage triggering inpatient restoration to competency, and triggering criminal commitment if not competent); and
(3) if non-dangerous but not competent and the charges are dismissed, extend existing "assisted outpatient treatment" programs as a community-based alternative to civil commitment.

The CPAC amendment would:

- reinstate the phrase "psychologist or psychiatrist" in identifying those qualified to perform competency evaluations
- change commitment for competency restoration and criminal commitment from a "department of health" facility to a "licensed inpatient psychiatric hospital"
- reinstate the calculation of deadlines during competency restoration from the hospital's *receipt of necessary documents* rather than the court's order, and similarly require

documents be provided for evaluating developmental or intellectual disability under Section 31-9-1.6.

- return the obligation of competency restoration progress reports and involuntary treatment eligibility to the "treatment supervisor" specifically (rather than the department generally)

FISCAL IMPLICATIONS

The number of LOPD cases closed (dismissed or criminally committed) due to incompetency is consistently 3% or less of LOPD cases. *See* chart, attached. That being said, this bill may increase LOPD workload in litigating criminal commitment if more cases qualify for that outcome under the amended "dangerous" definition. It may also result in a higher workload under the same number of cases as the bill adds additional issues to consider and potentially litigate by adding both inpatient and outpatient treatment alternatives based on often hard-to-determine criteria. Although the bill requires a neutral expert's opinion on the criteria, the defense and state are also permitted to present their own experts in such hearings, and we could see an uptick of competing expert opinion litigation in those settings.

Finally, if the bill achieves its apparent goal of treating a greater number of incompetent defendants to competency, and thus permitting those cases to go to trial, the LOPD may see *some* unknown number of the current 3% of competency-resolved cases actually proceed to trial. While the LOPD would likely be able to absorb some additional workload under the proposed law, any increase in litigation brought about by the cumulative effect of this and all other proposed criminal legislation would bring a concomitant need for an increase in indigent defense funding to maintain compliance with constitutional mandates.

SIGNIFICANT ISSUES

The CPAC amendments appear directed at practical concerns for NMDOH in executing the mandates of HB 4. They do not notably impact the LOPD analysis outlined below.

It violates due process to prosecute, try, and criminally punish an incompetent defendant. To be competent a person must have 1) a factual understanding of the proceedings, 2) a rational understanding of the proceedings including the ability "to comprehend the reasons for punishment," 3) an ability to assist the defense, and 4) an ability to consult with the lawyer with a reasonable degree of rational understanding. If, by reason of mental illness or cognitive disability, a person cannot do any one of those things, the criminal case cannot proceed. *See State v. Rotherham*, 1996-NMSC-048, ¶ 13, 122 N.M. 246.

The procedure used to assess and determine competency is complex and fraught with competing interests. It is high time New Mexico refocused our efforts in addressing the intersection of behavior health and the criminal legal system. HB 4 presents some significant improvements to the current process. This analysis explains how the bill would change (or retain) the current process, raises some practical and policy concerns with specific provisions, and makes recommendations for more effective or more comprehensive reforms that ensure a humane response to a public health issue, while addressing public safety concerns.

Non-custodial alternatives

HB 4 prioritizes outpatient options at two critical stages. First, when a defendant is first

found not competent, current law requires commitment to NMBHI in order to attempt to "restore" a defendant to competency so that they can be tried. Recognizing that restoration to competency is not the same process used to "treat" a behavioral health issue for long-term maintenance or recovery, HB 4 describes the process as "programming." It is notable that this frank and accurate description maintains a distinction from treatment described in other portions of the process.

Moreover, under current law, dangerous defendants are committed to BHI to restore competency and non-dangerous defendant's cases are simply dismissed because the statute provides no mechanism for restoring non-dangerous defendants' competency. HB 4 creates an outpatient restoration programming alternative for non-dangerous defendant with a goal of restoring competency and proceeding to trial. By allowing non-dangerous defendants the option of outpatient, community-based restoration programming, the bill allows defendants to maintain often crucial community ties while making it possible for the State to hold them to account in the criminal case. Analyst flags that most New Mexico communities will not have any remotely appropriate option available until an infrastructure is funded and created.

Meanwhile, if unsuccessful in restoring competency, the bill also creates a non-custodial long-term treatment option if a defendant remains not competent but also not dangerous, and thus does not qualify for criminal commitment. There is clearly value in providing a non-criminal treatment-based response to low-level "public peace" crimes committed by incompetent people when criminal commitment is improper. HB 4 would create a direct path to existing programs for "assisted outpatient treatment" ("AOT") often referred to as "involuntary treatment." While many experts in the field question the efficacy of involuntary treatment, it does have a greater chance of success when implemented in a community-based outpatient setting. Analyst flags that expanding reliance on AOT statewide in this manner will place a significant strain on existing treatment providers and may not be available to effectuate the statutory mandate until additional AOT infrastructure is funded and created.

One practical concern is that imposing involuntary commitment and/or forced treatment for incompetent defendants, even if their criminal case is dismissed, could dis-incentivize raising competency where the criminal sanction may actually be more desirable to some individuals. This may also present an ethical quandary for defense counsel who may not participate in the prosecution of an incompetent client, but who may believe that a negotiated criminal plea would be in their best interests if available commitment or forced treatment options would not. That being said, having the options of community-based restoration to competency and assisted outpatient treatment upon dismissal could provide greater opportunities for resolution by plea and reduce the number of people involuntarily committed to custodial treatment facilities, which are not an ideal form of treatment.

Nevertheless, the bill appears to recognize that much of the criminal conduct in these cases is intrinsically linked with a behavioral health issue that can be treated. One gap that remains in HB 4 is the need for a long-term continuum of care after someone is released from a criminal or civil commitment. HB 4 maintains the existing option for judges to require NMDOH to continue treating an individual whose competency is either restored or cannot be restored "until the conclusion of the criminal proceedings." *See* [page 18, line 2; page 19, line 8-9] But there is no provision for ongoing *outpatient* care after the criminal proceedings are done, or after release from a civil or criminal commitment. HB 4 would benefit from a provision that provides for tapered treatment services after the criminal case is over, or when reentering the community from a term of commitment.

Consistent with the treatment-based interventions inherent to AOT, HB 4 could also be more comprehensive and impactful if it offered an option of a treatment-based diversion, which would remove many of these cases from the judicial competency process entirely, if completed successfully. LOPD recommends considering incorporating this alternative as well, so long as the program is tailored to the unique needs of incompetent defendants (i.e., not requiring an admission of guilt that they are not legally competent give).

Expanding "dangerous" crimes qualifying for criminal commitment.

HB 4 would expand the definition of "dangerous" as used in Section 31-9-1.2, which is the stage at which the court determines *future dangerousness* based on a likelihood of *future* criminality. At the 1.2 stage, dangerousness determines whether a person may be committed for up to nine months for purposes of restoration to competency. If the person cannot be restored to competency in that amount of time, the dangerousness assessment reoccurs at the 31-9-1.5 stage, when the court decides whether to order long-term criminal commitment.

If a defendant is not competent and competency cannot be restored, the court may criminally commit them if it finds they did in fact commit one or more enumerated crimes, and that they are still dangerous under the -1.2 definition. The court must take evidence about the charges themselves to decide whether there is reason to believe the crimes were in fact committed. If the court finds the crimes were committed and that the defendant remains dangerous, it may commit a person for the duration of the maximum sentence they could have served if convicted.

A significant change in HB 4 is that it would expand the list of "enumerated offenses" qualifying for criminal commitment under -1.5, and then replaces the 1.2 dangerous definition in terms of *future* risk of committing that same list of crimes. LOPD raises concern about inclusion of the following crimes, for the following reasons:

(1) child abuse by endangerment includes negligent conduct resulting in no harm at all, and questions whether this should be included in the list of presumptively dangerous behavior;
(2) sexual exploitation of a child includes the possession of child pornography images, typically downloaded from the internet to an electronic device, an offense that is appropriately criminal but involves no interaction with minors or further dissemination of the material;
(3) human trafficking is a broad statutory crime that includes some conduct that presents a *risk* of great bodily harm or rape (such as "transporting or obtaining by any means another person with the intent or knowledge that force, fraud or coercion will be used to subject the person to labor, services or commercial sexual activity") but does not actually require the resulting harm ever occur, and also includes culpable but non-dangerous conduct such a "benefiting, financially or by receiving anything of value, from the labor, services or commercial sexual activity of another person with the knowledge that force, fraud or coercion was used to obtain the labor, services or commercial sexual activity." Human trafficking is not an inherently "dangerous" crime; if it is to be included, it should at least be more narrowly tailored to "human trafficking that results in the infliction of great bodily harm or a sexual offense";
(4) any felony involving the "use of a firearm" can include verbal threats made while a person has a firearm wholly concealed in their pocket. If this provision remains in the bill, it should be more narrowly tailored to require a "violent felony" involving use of a firearm; and

(5) aggravated arson, which by definition requires the infliction of great bodily harm, and is therefore redundant of the existing first criteria of a felony resulting in great bodily harm, and it is therefore unnecessary to separately list it.

Evaluations & Reports

Section 2 of the bill requires a qualified professional prepare a report addressing first their opinion of competency based on constitutional requirements. If the expert believes the defendant is competent to stand trial, the report is complete. If, however, the expert believes the defendant is not competent, they must also provide their opinion as to whether the defendant (1) qualifies for "involuntary commitment" (based on criteria from existing law); or (2) qualifies for AOT/involuntary treatment (based on criteria from existing law). Preparing both of these opinions on a rapid timeline is problematic because competency evaluations are non-diagnostic so they can be done after minimal interaction with the defendant, but the other criteria they would have to address for commitment or AOT *are* diagnostic and require observations over time. LOPD recommends breaking these assessments into two separate reports, by amending the bill at page 4, line 5-8, as follows:

> If a qualified professional believes a defendant is not competent to stand trial, the forensic evaluator will promptly submit the competency findings to the court. No less than twenty-four hours before the competency hearing, the evaluator will submit a report addendum to reflect ~~an evaluation report shall include~~ the qualified professional's opinion as to whether the defendant [satisfied criteria for civil commitment and/or AOT)]

Based on the initial evaluation, the court must hold a hearing to determine if the defendant is competent. If they are competent, the case proceeds to trial. If not, the court may dismiss the case without prejudice (meaning charges could be re-filed in the future if the defendant became competent) and, if it does so, HB 4 indicates the court may advise a DA to consider initiating civil commitment (and may detain the defendant for up to 7 days to allow the DA to take that step) or may advise the DA to consider initiating AOT (without detention). Section 8 of the bill authorizes the DA to use the original evaluation's findings on those issues for those purposes.

If the court does not dismiss, the court may attempt competency restoration. To do so, the court must assess future dangerousness under Section 31-9-1.2. If dangerous, commit to a locked DOH facility for restoration programming. If not dangerous, the court may send the defendant to an outpatient restoration program.

For not dangerous defendants sent to outpatient restoration, Section 3 of the bill requires a 30-day "progress report" from an outpatient restoration program containing (1) an "initial assessment" of the programming that "will be provided" and (2) the program's ability to provide it, (3) the defendant's amenability to the programming, as well as (4) "an opinion as to the probability of the defendant being restored to competency within ninety days." These categories of information all seem appropriate for the initial progress report at 30 days. However, Section 3 also requires the 30-day report include what would now be a *second* opinion from the restoration program on whether the defendant meets the criteria for involuntary civil commitment or AOT, same questions already addressed in the original competency evaluation. LOPD recommends that these questions *not* be addressed in the 30-day report, as they are not live issues at that time, and only become live issues if the person is *not* restored to competency and alternatives to criminal prosecution must be considered. HB 4 requires a hearing before 90 days of community

restoration programming to see if the defendant is now competent. The restoration program "shall" provide a report seven days prior to that hearing containing various competency-related opinions, the defendant's medication information, and what would now be a *third* opinion on qualifying for involuntary commitment or AOT. Again, LOPD recommends limiting the restoration program's opinions on qualification for involuntary commitment or AOT to this 90-day report to avoid redundancy and to tie the opinions more closely to the relevant time when such referrals might actually be made.

If the court finds competency was restored, the court would set the case for trial. If competency was not restored, the court shall dismiss the criminal case without prejudice and may advise the DA to consider initiating involuntary civil commitment or AOT.

For dangerous defendants sent to DOH facilities for restoration, Section 4 would amend Section 31-9-1.3 dictating timelines and reporting requirements as DOH endeavors to restore competency. HB 4 would add an additional requirement to the final report before a 90-day review hearing, that must include: "if the department of health believes the defendant remains not competent, an opinion as to whether the defendant satisfies the criteria for" involuntary civil commitment or AOT. If the court finds competency was restored at 90 days, the court would set the case for trial and may order DOH to provide ongoing treatment "until the conclusion of the criminal case." But if the court finds competency is not restored, it may continue efforts for custodial restoration programming if "the defendant is making progress" for up to a total of nine months.

Because inpatient restoration has a nine-month window for restoring competency, this 90-day report need not address commitment or AOT; it is premature. As with the non-dangerous restoration provisions, HB 4 requires *another report* by the deadline for restoration (nine months for inpatient), that includes opinions about competency, the defendant's medication information, and *another* opinion on qualifying for civil commitment or AOT. As above, LOPD recommends removing commitment/AOT opinions from the initial 90-day report, and only including them in the 9-month report.

When Restoration of Dangerous Defendants is Not Possible

Section 5 maintains three primary options in Section 31-9-1.4. If after nine months, there is no likelihood of competency restoration, the court may: (1) if charged with enumerated crimes, hold a criminal commitment hearing under -1.5; or if **not** charged with enumerated crimes, (2) release the defendant and dismiss the criminal case with prejudice; or (3) dismiss the case *without* prejudice *and* -- if the nine-month report indicates they met the criteria -- DOH *shall* (or the prosecutor may instead) initiate involuntary **civil** commitment (allowing the court to hold the defendant for up to 7 days to enable that process).

Section 6 amends Section 31-9-1.5, the process for criminal commitment. As with current law, the court must factually decide whether the defendant committed one or more of the enumerated crimes, *and* their future dangerousness/risk of committing those same crimes, but the list of applicable crimes is expanded. *See* "Expanding 'dangerous' crimes," discussion *supra*.

Consistent with current law, if the court finds the defendant did commit an enumerated crime, remains incompetent, and remains dangerous, then the court orders criminal commitment for up to the maximum sentence they could have received if criminally convicted, with ongoing hearings "at least every 2 years" to reassess competency and dangerousness. If, based on those

two-year review hearings, they ever become competent, the case proceeds to a criminal trial. If they ever become not dangerous, they shall be released, but HB 4 would newly add a proviso that the DA can initiate civil commitment "at any time" and can request up to 7 days' detention in order to do so.

LOPD recommends an additional amendment to Section 31-9-1.5, which is not a consequence of HB 4, but is unaddressed under current law. The criminal commitment process addresses only enumerated charges, but does not tell courts how to resolve any other charges within the same case that are not enumerated, and are thus not "resolved" by the criminal commitment. If a defendant remains not competent at the expiration of the commitment period (either by release due to non-dangerousness, or by fully serving the maximum sentence), HB 4 should mandate dismissal with prejudice of all pending charges, including those resolved by commitment and any remaining charges not enumerated for commitment.

Current law and HB 4 require release from criminal commitment upon expiration of the maximum available criminal sentence regardless of competency or dangerousness status, although it incorporates provisions mandating involuntary civil commitment proceedings if recommended. As noted above, LOPD further recommends making available ongoing tapered treatment services when the individual is released to the community from criminal commitment to ensure continuity of care during reentry.

PERFORMANCE IMPLICATIONS

See Fiscal Implications.

ADMINISTRATIVE IMPLICATIONS

None noted.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None noted.

TECHNICAL ISSUES

None noted.

OTHER SUBSTANTIVE ISSUES

None noted.

ALTERNATIVES

Modifications and additions discussed above in **Significant Issues**.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo

AMENDMENTS

None noted.