

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 464

INTRODUCER: Senator Wright

SUBJECT: Certain Defendants With Mental Illness

DATE: November 8, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stokes	Jones	CJ	Pre-meeting
2.			ACJ	
3.			AP	

I. Summary:

SB 464 provides that fiscally constrained counties that are awarded reinvestment grants to establish programs to divert misdemeanor defendants with mental disorders from jails to community-based treatment pursuant to proposed s. 916.135, F.S., are not required to provide matching funds. The application criteria for these grants are provided in s. 394.658, F.S.

Additionally, this bill creates a new section of law in ch. 916, F.S., that provides a model process for diverting misdemeanor defendants with mental illness. The process may be modified according to each community's particular resources. Communities that obtain grants pursuant to s. 394.658, F.S., must adhere to the model process to the extent that local resources are available to do so.

This bill will likely have a fiscal impact on local mental health facilities, including Baker Act receiving facilities, courts, local law enforcement, and county jails.

This bill is effective July 1, 2020.

II. Present Situation:

Mental Health Needs in the Criminal Justice System

Individuals who experience a mental health crisis are more likely to encounter law enforcement than to get medical assistance. Approximately 44 percent of jail inmates have been told that they have a mental disorder, and 26 percent of jail inmates reported incidents of serious psychological distress.¹ A person with mental illness who is jailed is likely to get worse after incarceration.

¹ *BJS Finds Inmates Have Higher Rates of Serious Psychological Distress Than the U.S. General Population*, Bureau of Justice Statistics, June 22, 2017, available at, <https://www.bjs.gov/content/pub/press/imhprj1112pr.cfm> (last visited November 6, 2019).

They are less likely to get treatment in jail, are vulnerable to victimization, and may have less access to healthcare when released. While in jail, at least 83 percent of individuals with mental illness do not have access to proper treatment.²

Legislative Intent

The Legislature sets forth its intent regarding mentally ill and intellectually disabled defendants in s. 916.105, F.S. It is the intent of the Legislature:

- That the Department of Children and Families and the Agency for Persons with Disabilities establish and maintain facilities for the purpose of treatment or training of felony defendants who have been found incompetent or not guilty by reason of insanity.³
- That treatment programs under this chapter are provided in a manner that ensures the rights of defendants.⁴
- That evaluations and services provided under this chapter should be provided in a community setting, community residential facilities, or civil facilities, whenever this is a feasible alternative to a state forensic facility.⁵
- To minimize and achieve an ongoing reduction in the use of restraint and seclusion of persons committed under this chapter.⁶

Grant Program

In 2007, the Legislature created the Criminal Justice, Mental Health, and Substance Abuse Reinvestment Grant Program.⁷ The purpose of the program is to provide funding to counties to plan, implement, or expand initiatives that increase public safety, avert increased spending on criminal justice, and improve the accessibility and effectiveness of treatment services. These services are for adults and juveniles who have a mental illness, substance abuse disorder, or co-occurring mental health and substance abuse disorders and who are in, or at risk of entering, the criminal or juvenile justice systems.⁸

The Criminal Justice, Mental Health, and Substance Abuse Statewide Grant Review Committee (Committee) is the advisory body that reviews policy and funding issues to help reduce the impact of persons with mental illness and substance abuse disorders on communities, criminal justice agencies, and the court system.⁹

Section 394.658, F.S., authorizes the Committee, in collaboration with the Department of Children and Families, the Department of Corrections, the Department of Juvenile Justice, the Department of Elderly Affairs, and the Office of the State Courts Administrator, to establish criteria to be used when reviewing grant applications.¹⁰

² *Jailing People With Mental Illness*, National Alliance on Mental Illness, available at, <https://www.nami.org/Learn-More/Public-Policy/Jailing-People-with-Mental-Illness> (last visited November 6, 2019).

³ Section 916.105(1), F.S.

⁴ Section 916.105(2), F.S.

⁵ Section 916.105(3), F.S.

⁶ Section 916.105(4), F.S.

⁷ Chapter 2007-200 L.O.F.

⁸ Section 394.656(1), F.S.

⁹ Section 394.656(3), F.S.

¹⁰ Section 394.658(1), F.S.

This section provides criteria for 1-year planning grants and 3-year implementation or expansion grants. Each county application must include:

- An analysis of the current jail population.
- Proposed strategies to serve the target population.
- The projected effect on the target population and budget of the jail or juvenile detention facility.
- Proposed strategies to preserve and enhance its community based programs.
- Proposed strategies to continue the implemented or expanded programs that have resulted from funding.¹¹

Additionally, applicant counties that want to obtain a 1-year planning grant must provide:¹²

- A strategic plan to initiate systemic change to identify and treat individuals who have a mental illness, substance abuse disorder, or co-occurring mental health and substance abuse disorder who are in, or at risk of entering the criminal or juvenile justice system.
- The grant will be used to develop collaboration among affected government agencies, whose efforts must be the basis for developing the problem solving model and strategic plan.¹³
- Strategies to divert individuals from judicial commitment to community-based services offered by the DCF in accordance with s. 916.13, F.S.,¹⁴ and s. 916.17, F.S.¹⁵

Applicant counties that want to obtain a 3-year implementation or expansion grant must provide information demonstrating that it has completed a well-established collaboration plan that uses evidence based practices. These grants may be used to support programs including but not limited to:

- Mental health courts.
- Diversion programs.
- Alternative prosecution and sentencing programs.
- Crisis intervention teams.
- Treatment accountability services.
- Specialized training for criminal justice, juvenile justice, and treatment service professionals.
- Service delivery of collateral services such as housing, transitional housing, and supported employment.
- Reentry services to create or expand mental health and substance abuse services and supports for affected persons.¹⁶

¹¹ Section 394.658(1)(c), F.S.

¹² Section 394.658(1)(a), F.S.

¹³ Section 394.658(1)(a), F.S., provides that affected agencies include the criminal, juvenile, and civil justice systems, mental health and substance abuse treatment service providers, transportation programs, and housing assistance programs.

¹⁴ Section 916.13, F.S., governs the involuntary commitment of defendants who are adjudicated incompetent.

¹⁵ Section 916.17, F.S., governs the conditional release of defendants who are adjudicated incompetent or found guilty by reason of insanity.

¹⁶ Section 394.658(1)(b), F.S.

Counties are required to make available resources equal to the total amount of the grant. Fiscally constrained counties are only required to make available resources that total 50 percent of the grant.¹⁷

Baker Act

The Legislature passed the Florida Mental Health Act, also known as the Baker Act, in 1971. The Baker Act provided comprehensive mental health treatment reform, as well as established rights and due process for persons with mental illness.¹⁸ The Baker Act is contained in ch. 394, F.S.

A person may be involuntary examined to determine whether a person qualifies for involuntary services.¹⁹ Involuntary services include court-ordered outpatient services or inpatient placement for mental health treatment.²⁰ A person may be taken to a receiving facility for an involuntarily examination if there is reason to believe that the person has a mental illness²¹ and because of his or her mental illness:

- The person has refused voluntary examination after conscientious explanation and disclosure of the purpose of the examination; **or**
- The person is unable to determine for himself or herself whether examination is necessary; **and**
- Either of the following applies:
 - Without care or treatment, the person is likely to suffer from neglect or refuse to care for himself or herself; such neglect or refusal poses a real and present threat of substantial harm to his or her well-being, and it is not apparent that such harm may be avoided through the help of willing family members or friends or the provision of other services; **or**
 - There is a substantial likelihood that without care or treatment the person will cause serious bodily harm to himself or herself or others in the near future, as evidenced by recent behavior.²²

There are three means of initiating an involuntary examination. First, a court may enter an ex parte order stating that a person appears to meet the criteria for involuntary examination and specifying the findings on which that conclusion is based.²³

Second, a law enforcement officer must take a person who appears to meet the criteria for involuntary examination into custody and deliver the person or have him or her delivered to an

¹⁷ Section 394.658(2), F.S., provides that “available resources,” includes in-kind contributions.

¹⁸ *History of the Baker Act, It's Development & Intent*, Department of Children and Families, available at, <https://www.myflfamilies.com/service-programs/samh/crisis-services/laws/histba.pdf> (last visited October 24, 2019).

¹⁹ Section 394.455(22), F.S.

²⁰ Section 394.455(23), F.S.

²¹ “Mental illness” means an impairment of the mental or emotional processes that exercise conscious control of one’s actions or of the ability to perceive or understand reality, which impairment substantially interferes with the person’s ability to meet the ordinary demands of living. For purposes of Part I of ch. 394, F.S., the term does not include a developmental disability as defined in ch. 393, F.S., intoxication, or conditions manifested only by antisocial behavior or substance abuse.

Section 394.455(28), F.S.

²² Section 394.463(1), F.S.

²³ Section 394.463(2)(a)1., F.S.

appropriate, or the nearest, facility for examination. The officer executes a written report detailing the circumstances under which the person was taken into custody, which is made a part of the patient's clinical record.²⁴

Third, a physician, clinical psychologist, psychiatric nurse, mental health counselor, marriage and family therapist, or clinical social worker may execute a professional certificate²⁵ stating that he or she has examined a person within the preceding 48 hours and finds that the person appears to meet the criteria for involuntary examination and stating the observations upon which that conclusion is based.²⁶

A person cannot be held in a receiving facility²⁷ for involuntary examination for more than 72 hours.²⁸ Within that 72-hour examination period, or, if the 72 hours ends on a weekend or holiday, no later than the next working day, one of the following must occur:

- The patient must be released, unless there is a jail hold, in which case law enforcement will resume custody.
- The patient must be released into voluntary outpatient treatment.
- The patient must be asked to give consent to be placed as a voluntary patient if placement is recommended.
- A petition for involuntary placement must be filed in circuit court for outpatient or inpatient treatment.²⁹

A patient is entitled to a hearing within five working days after a petition for involuntary placement is filed. A patient is entitled to representation at the hearing for involuntary inpatient placement.³⁰ The petitioner must show, by clear and convincing evidence all available less restrictive treatment alternatives are inappropriate and that:

- The patient is mentally ill and because of the illness has refused voluntary placement for treatment or is unable to determine the need for placement; and
- The patient is manifestly incapable of surviving alone or with the help of willing and responsible family and friends, and without treatment is likely to suffer neglect to such an extent that it poses a real and present threat of substantial harm to the patient's well-being; or
- A substantial likelihood exists that in the near future the patient will inflict serious bodily harm on himself or herself or another person.³¹

²⁴ Section 394.463(2)(a)2., F.S.

²⁵ Florida Department of Children and Families, Form CF-MH 3052B, available at, <https://eds.myflfamilies.com/DCFFormsInternet/Search/DCFFormSearch.aspx> (last visited October 25, 2019).

²⁶ Section 394.463(2)(a)3., F.S.

²⁷ Section 394.455(39), F.S., defines "receiving facility" as a public or private facility or hospital designated by the department to receive and hold or refer, as appropriate, involuntary patients under emergency conditions for mental health or substance abuse evaluation and to provide treatment or transportation to the appropriate service provider. The term does not include a county jail.

²⁸ Section 394.463(2)(g), F.S.

²⁹ *Id.*

³⁰ Section 394.467(4) and (6), F.S.

³¹ Section 394.467(1), F.S.

Competency to Proceed

Any party or the court may raise the issue of a defendant's competency at any time.³² A defendant may be found incompetent to proceed due to a mental illness, or due to intellectual disability or autism.³³

When incompetency due to mental illness is raised, the court must appoint no more than three experts to determine competency to proceed. The expert must be a psychiatrist, licensed psychologist, or physician, and to the extent possible must have completed forensic evaluator training approved by the department.³⁴

A defendant is incompetent to proceed if the defendant does not have sufficient present ability to consult with her or his lawyer with a reasonable degree of rational understanding or if the defendant has no rational, as well as factual, understanding of the proceedings against her or him.³⁵

When determining competency to proceed, an expert must consider and include in the report the defendant's capacity to:

- Appreciate the charges or allegations against the defendant.
- Appreciate the range and nature of possible penalties.
- Understand the adversarial nature of the legal process.
- Disclose to counsel facts pertinent to the proceedings.
- Manifest appropriate courtroom behavior.
- Testify relevantly.
- Any other factor deemed relevant by the expert.³⁶

If an expert finds a defendant incompetent to proceed they must include the following in the report:

- The mental illness causing incompetency.
- Explanation of each possible treatment option in the order of recommendation by the expert.
- Availability of acceptable treatment and whether treatment is available in the community.
- The likelihood the defendant will attain competency under the recommended treatment and the probable duration of treatment to restore competency.³⁷

If the defendant is charged with a felony and is found incompetent due to mental illness, he or she may be subject to involuntary commitment for competency restoration. The court may order conditional release in lieu of involuntary commitment for a defendant who has been found incompetent due to mental illness and is in need of competency training.³⁸

³² *Lane v. State*, 388 So. 2d 1022, 1025 (Fla. 1980).

³³ Sections 916.12 and 916.3012, F.S.

³⁴ Section 916.115(1), F.S.

³⁵ Section 916.12(1), F.S.

³⁶ Section 916.12(2), F.S.

³⁷ Section 916.12(4), F.S.

³⁸ Section 916.17, F.S.

It appears there is no mandatory competency restoration for misdemeanor defendants provided in the Florida Statutes.

Mental Health Court

Mental health courts are problem-solving courts that were implemented as a response to repeat offenders with untreated serious mental illness. As of August 2019, Florida has 27 mental health courts.³⁹ Mental health court guidelines are provided in s. 394.47892, F.S., and include, in part, that programs may include pretrial intervention programs, postadjudicatory mental health court programs, and review of the status of compliance or non-compliance of sentenced defendants through a mental health court program.

Mental health court programs may include pretrial intervention programs or postadjudicatory mental health court programs. Entry into a pretrial mental health court program is voluntary.⁴⁰ Entry into a postadjudicatory mental health court program as a condition of probation or community control must be based on:

- The sentencing court's assessment of the defendant's criminal history, mental health screening outcome, the defendant's amenability to the services of the program, and the total sentencing points;
- The recommendation of the state attorney and the victim, if any; and
- The defendant's agreement to enter the program.⁴¹

III. Effect of Proposed Changes:

Legislative Intent

The bill amends s. 916.105, F.S., to include the following Legislative intent:

- Misdemeanor defendants with mental illness, intellectual disability, or autism are evaluated and provided services in a community setting.
- Law enforcement agencies provide officers with crisis intervention team training.
- All communities are encouraged to apply for Criminal Justice, Mental Health, and Substance Abuse Reinvestment Grants pursuant to s. 394.656, F.S., to establish programs for misdemeanor defendants who have mental disorders and to divert these persons from jails to community based treatment.

Misdemeanor Mental Health Diversion and Competency Program

The bill creates s. 916.135, F.S., relating to misdemeanor mental health diversion and competency programs. This bill encourages communities to establish and expand programs by applying for funding pursuant to s. 394.658, F.S.

The bill provides a model process for diverting misdemeanor defendants who have a mental illness. While the process may be tailored to each community's particular need, the applicant

³⁹ Florida Courts, *Mental Health Courts*, available at, <https://www.flcourts.org/Resources-Services/Court-Improvement/Problem-Solving-Courts/Mental-Health-Courts> (last visited October 24, 2019).

⁴⁰ Section 394.47892(2) and (3), F.S.

⁴¹ Section 394.47892(4)(a), F.S.

community must adhere to the process to the extent it is possible in order to receive funding under s. 394.656, F.S.

The model process provides that within 24 hours of booking, a misdemeanor defendant may be screened by the jail's corrections or medical staff to determine if there is an indication of a mental disorder. If a mental disorder is indicated, the defendant may be evaluated by a qualified professional for involuntary commitment under the Baker Act.⁴² The qualified professional must evaluate the defendant as if they were in the community and may not rely on the defendant's incarcerated status when determining whether they are a danger to themselves or others.

If the defendant meets criteria, the qualified professional may issue a professional certificate pursuant to the Baker Act, and the defendant must be transported within 72 hours to a qualified crisis stabilization unit. The jail may place a hold on the defendant so that the defendant will only be released back to the custody of the jail, or the misdemeanor court may order that the defendant be transported to appear before the misdemeanor court.

Once the defendant is at the receiving facility, he or she will be evaluated pursuant to the Baker Act. If Baker Act criteria is met, the treatment center may forward the misdemeanor court a discharge plan or an outpatient treatment plan. If the defendant does not meet criteria, the treatment center may create an outpatient treatment plan and forward it to the misdemeanor court. The court may consider releasing the defendant on his or her own recognizance on the condition that the defendant comply with the plan created by the treatment facility.

If a defendant is found to have a mental disorder but a professional certificate is not issued, the misdemeanor court is required to order that the defendant be assessed for outpatient treatment. The assessment may be completed:

- By jail medical staff.
- At the jail via tele-assessment by the local mental health treatment center.
- By transport of the defendant to and from the local mental health treatment center by the sheriff or jail authorities.
- By release of the defendant on his or her own recognizance on the condition that the assessment be completed at the local mental health treatment center within 48 hours after his or her release, and that all treatment recommendations must be followed.

If an outpatient treatment plan is recommended as a result of this assessment, and the defendant is still in custody, the court may release the defendant on his or her own recognizance with the condition that all treatment recommendations are followed.

If a defendant is released from custody on pretrial release at any time prior to the assessment or evaluation process provided by this bill, the court or either party may request the court to order the defendant to be assessed or evaluated. The court may use any treatment recommendations as a result of the assessment or evaluation as a condition of pre-trial release.

⁴² Section 394.463(2)(a)3., F.S., provides that a physician, clinical psychologist, psychiatric nurse, mental health counselor, marriage and family therapist, or clinical social worker may execute a professional certificate.

The bill also provides that if the court or either party raises a competency concern at any state of the proceedings, the court may appoint a qualified professional to evaluate the defendant under the Baker Act. If it appears the defendant meets criteria, the qualified professional may issue a professional certificate.

Speedy trial is tolled immediately upon the issuance of a professional certificate. The tolling period ends when the misdemeanor court finds that the defendant:

- Completed mandatory treatment under the Baker Act; or
- Is no longer subject to mandatory treatment under the Baker Act.

If the defendant does not meet criteria under the Baker Act and a professional certificate is not issued, the defendant may be evaluated for the criteria provided below. The criteria will be provided in a report to the misdemeanor court. The court will hold a hearing to determine by clear and convincing evidence whether the defendant meets any one or more of the following:

- The defendant is manifestly incapable of surviving alone or without the help of willing, able, and responsible family or friends, including available alternative services, and without treatment the misdemeanor defendant is likely to suffer from neglect or refuse to care for himself or herself, and such neglect or refusal poses a real and present threat of substantial harm to the misdemeanor defendant's well-being.
- There is substantial likelihood that in the near future the misdemeanor defendant will inflict serious harm on himself or herself or another person, as evidenced by recent behavior, actions, or omissions causing, attempting, or threatening such harm. Such harm includes, but is not limited to significant property damage.
- There is substantial likelihood that a mental disorder played a central role in the behavior leading to the misdemeanor defendant's current arrest or there is a substantial likelihood that a mental disorder will lead to repeated future arrests for criminal behavior if the misdemeanor defendant does not receive treatment.

If any one or more of the above criteria is met, Speedy trial will be immediately tolled. The court may then order the defendant to submit to a full mental health assessment within 48 hours at the nearest local mental health treatment center. If the defendant is in custody, the defendant may be transported by law enforcement for the assessment, a tele-assessment may be completed by the treatment facility, or the defendant may be released on the condition that he or she report for the assessment.

The results of the assessment may be provided to the court, state, and defense. The court may enter an order setting or amending the conditions of pre-trial release to compel the defendant's compliance with treatment recommendations. If none of the criteria are met at the hearing, the defendant may pursue a traditional competency evaluation.

Upon completion of all treatment recommendations, the following may be considered:

- Dismissal of the charges.
- Referral to mental health court or another mental health diversion program.
- The defendant may contest the misdemeanor charges.

If the defendant fails to comply with conditions of release, the court may revoke the defendant's pretrial release and the defendant will be returned to jail.

Criminal Justice, Mental Health, and Substance Abuse Reinvestment Grant Program Requirements

The bill amends s. 394.658, F.S., to create an exception for the matching of funds by fiscally constrained counties. Fiscally constrained counties that are awarded reinvestment grants to establish programs to divert misdemeanor defendants with mental disorders from jails to community-based treatment pursuant to s. 916.135, F.S., (created in the bill) may not be required to provide matching funds.

This new exception only applies to fiscally constrained counties who apply for grants to create the program pursuant to proposed s. 916.135, F.S.

This bill is effective July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

It is possible that the bill related to certain defendants with mental illness may result in local fund expenditures for housing, transporting, or evaluating offenders in county jail. However, because any such local funding resulting from the requirements of the bill will directly relate to the defense and prosecution of criminal offenses, under Article VII, subsection 18(d) of the Florida Constitution, it appears there is no unfunded mandate.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:**State Government**

This bill may increase the demand on Baker Act receiving facilities serving defendants charged with misdemeanors who meet criteria for involuntary examination.

Local Government

The bill may increase the need for additional staff to screen misdemeanor offenders, or to transport them to and from receiving facilities. It may also have an impact on courts if additional staff are needed to process the new Baker Act cases resulting from the bill or to hold hearings when competency is raised for misdemeanor defendants.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 394.658 and 916.105.

This bill creates section 916.135 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.