

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 201 Criminal Defendants Adjudicated Incompetent to Proceed

SPONSOR(S): Health & Human Services Committee, Maney

TIED BILLS: **IDEN./SIM. BILLS:** SB 1284

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Children, Families & Seniors Subcommittee	16 Y, 0 N	Curry	Brazzell
2) Health Care Appropriations Subcommittee	13 Y, 0 N	Fontaine	Clark
3) Health & Human Services Committee	19 Y, 0 N, As CS	Curry	Calamas

SUMMARY ANALYSIS

When a criminal defendant is found mentally incompetent to proceed to trial, the court may commit the defendant to treatment in the state forensic system.

The state forensic system, governed by chapter 916, Florida Statutes, and administered by the Department of Children and Families (DCF), is a network of state facilities and community services for persons who have mental health issues, an intellectual disability or autism, and who are involved with the criminal justice system. Offenders charged with a felony and adjudicated incompetent to proceed due to mental illness, and offenders who are adjudicated not guilty by reason of insanity, may be involuntarily committed to state civil and forensic treatment facilities by the court, or may be released on conditional release by the court if the person is not serving a prison sentence. The committing court retains jurisdiction over the defendant while the defendant is under involuntary commitment or conditional release.

If after being committed the defendant does not respond to treatment and is deemed non-restorable, the defendant must either be released or civilly committed under the Baker Act.

A competency evaluation report is a standardized mental health document that addresses relevant mental health issues and the individual's clinical status regarding competence to proceed. A competency evaluation report is completed during the process by which a person is evaluated to determine whether or not an individual meets Baker Act criteria and in the process of moving a forensic commitment to a civil commitment.

HB 201 requires DCF to complete and submit a competency evaluation report to the circuit court within 30 days after the department determines that a defendant will not or is unlikely to regain competency to proceed. The bill requires a qualified professional, as defined by statute, to sign the report under penalty of perjury. The bill also defines competency evaluation report and specifies the minimum information that must be included in the report.

The bill does not have a fiscal impact on state or local government.

The bill provides an effective date of July 1, 2023.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

State Forensic System

Criminal Defendants and Competency to Stand Trial

The Due Process Clause of the 14th Amendment to the United State Constitution prohibits the states from trying and convicting criminal defendants who are incompetent to stand trial.¹ The states must have procedures in place that adequately protect the defendant's right to a fair trial, which includes his or her participation in all material stages of the process.² Defendants must be able to appreciate the range and nature of the charges and penalties that may be imposed, understand the adversarial nature of the legal process, and disclose to counsel facts pertinent to the proceedings. Defendants also must manifest appropriate courtroom behavior and be able to testify relevantly.³

If a defendant is suspected of being mentally incompetent, the court, counsel for the defendant, or the state may file a motion for examination to have the defendant's cognitive state assessed.⁴ If the motion is well-founded the court will appoint experts to evaluate the defendant's cognitive state. The defendant's competency is then determined by the judge in a subsequent hearing.⁵ If the defendant is found to be mentally competent, the criminal proceeding resumes.⁶ If the defendant is found to be mentally incompetent to proceed, the proceeding may not resume unless competency is restored.⁷

Involuntary Commitment of Defendant Adjudicated Incompetent

Chapter 916, Florida Statutes, governs the state forensic system, which is a network of state facilities and community services for persons who have mental health issues, an intellectual disability, or autism, and who are involved with the criminal justice system. Offenders who are charged with a felony and adjudicated incompetent to proceed due to mental illness⁸ and offenders who are adjudicated not guilty by reason of insanity may be involuntarily committed to state civil⁹ and forensic¹⁰ treatment facilities by the circuit court.¹¹ However, in lieu of such commitment, the offender may be released on conditional release¹² by the circuit court if the person is not serving a prison sentence.¹³ The committing court retains jurisdiction over the defendant while the defendant is under involuntary commitment or conditional release.¹⁴

¹ *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed. 815 (1966); *Bishop v. U.S.*, 350 U.S.961, 76 S.Ct. 440, 100 L.Ed. 835 (1956); *Jones v. State*, 740 So.2d 520 (Fla. 1999).

² *Id.* See also Rule 3.210(a)(1), Fla.R.Crim.P.

³ *Id.* See also s. 916.12, 916.3012, and 985.19, F.S.

⁴ Rule 3.210, Fla.R.Crim.P.

⁵ *Id.*

⁶ Rule 3.212, Fla.R.Crim.P.

⁷ *Id.*

⁸ "Incompetent to proceed" means "the defendant does not have sufficient present ability to consult with her or his lawyer with a reasonable degree of rational understanding" or "the defendant has no rational, as well as factual, understanding of the proceedings against her or him." S. 916.12(1), F.S.

⁹ A "civil facility" is a mental health facility established within the Department of Children and Families (DCF) or by contract with DCF to serve individuals committed pursuant to chapter 394, F.S., and defendants pursuant to chapter 916, F.S., who do not require the security provided in a forensic facility; or an intermediate care facility for the developmentally disabled, a foster care facility, a group home facility, or a supported living setting designated by the Agency for Persons with Disabilities (APD) to serve defendants who do not require the security provided in a forensic facility. Section 916.106(4), F.S. The DCF oversees two state-operated forensic facilities, Florida State Hospital and North Florida Evaluation and Treatment Center, and two privately-operated, maximum security forensic treatment facilities, South Florida Evaluation and Treatment Center and Treasure Coast Treatment Center.

¹⁰ Section 916.106(10), F.S.

¹¹ Sections 916.13, 916.15, and 916.302, F.S.

¹² Conditional release is release into the community accompanied by outpatient care and treatment. Section 916.17, F.S.

¹³ Section 916.17(1), F.S.

¹⁴ Section 916.16(1), F.S.

A civil facility is, in part, a mental health facility established within the Department of Children and Families (DCF) or by contract with DCF to serve individuals committed pursuant to ch. 394, F.S., and defendants pursuant to ch. 916, F.S., who do not require the security provided in a forensic facility.¹⁵

A forensic facility is a separate and secure facility established within DCF or the Agency for Persons with Disabilities (APD) to service forensic clients committed pursuant to ch. 916, F.S.¹⁶ A separate and secure facility means a security-grade building for the purpose of separately housing individuals with mental illness from persons who have intellectual disabilities or autism and separately housing persons who have been involuntarily committed from non-forensic residents.¹⁷

A court may only involuntarily commit a defendant adjudicated incompetent to proceed for treatment upon finding clear and convincing evidence that:¹⁸

- The defendant has a mental illness and because of the mental illness:
 - The defendant is manifestly incapable of surviving alone or with the help of willing and responsible family or friends, including available alternative services, and, without treatment, the defendant is likely to suffer from neglect or refuse to care for herself or himself and such neglect or refusal poses a real and present threat of substantial harm to the defendant's well-being; or
 - There is a substantial likelihood that in the near future the defendant will inflict serious bodily harm on herself or himself or another person, as evidenced by recent behavior causing, attempting, or threatening such harm.
- All available, less restrictive treatment alternatives, including treatment in community residential facilities or community inpatient or outpatient settings, which would offer an opportunity for improvement of the defendant's condition have been judged to be inappropriate; and
- There is a substantial probability that the mental illness causing the defendant's incompetence will respond to treatment and the defendant will regain competency to proceed in the reasonably foreseeable future.

If a person is committed pursuant to chapter 916, F.S., the administrator at the commitment facility must submit a report to the court:¹⁹

- No later than 6 months after a defendant's admission date and at the end of any period of extended commitment; or
- At any time the administrator has determined that the defendant has regained competency or no longer meets the criteria for involuntary commitment.

Incompetent and Non-Restorable Defendants

If after being committed the defendant does not respond to treatment and is deemed non-restorable, the administrator of the commitment facility must notify the court by filing a report in the criminal case.²⁰ Those who are found to be non-restorable must be civilly committed or released.²¹

Non-Restorable Competency

¹⁵ Section 916.106(4), F.S.

¹⁶ Section 916.106(10), F.S. A separate and secure facility means a security-grade building for the purpose of separately housing persons who have mental illness from persons who have intellectual disabilities or autism and separately housing persons who have been involuntarily committed pursuant to chapter 916, F.S., from non-forensic residents.

¹⁷ *Id.*

¹⁸ Section 916.13(1), F.S.

¹⁹ Section 916.13(2), F.S.

²⁰ Section 916.13(2)(b), F.S.

²¹ *Mosher v. State*, 876 So.2d 1230 (Fla. 1st DCA 2004).

An individual's competency is considered non-restorable when it is not likely that he or she will regain competency in the foreseeable future.²² The DCF must make every effort to restore the competency of those committed pursuant to chapter 916, F.S., as incompetent to proceed. To ensure that all possible treatment options have been exhausted, all competency restoration attempts in less restrictive, step-down facilities should be considered prior to making a recommendation of non-restorability, particularly for individuals with violent charges.

Individuals who are found to be non-restorable in less than five years of involuntary commitment under section 916.13, F.S., require civil commitment proceedings or release. After an evaluator of competency has completed a competency evaluation and determined that there is not a substantial probability of competency restoration in the current environment in the foreseeable future, the evaluator must notify the appropriate recovery team²³ coordinator that the individual's competency does not appear to be restorable.

After notification, the recovery team's psychiatrist and clinical psychologist members must complete an independent evaluation to examine suitability for involuntary placement. Once the evaluation to examine suitability for involuntary placement is complete, the recovery team meets to consider the following:²⁴

- Mental and emotional symptoms affecting competency to proceed;
- Medical conditions affecting competency to proceed;
- Current treatments and activities to restore competency to proceed;
- Whether relevant symptoms and conditions are likely to demonstrate substantive improvement;
- Whether relevant and feasible treatments remain that have not been attempted, including competency restoration training in a less restrictive, step-down facility; and
- Additional information as needed (including barriers to discharge, pending warrants and detainers, dangerousness, self-neglect).

The recovery team must document the team meeting and considerations for review, and, if applicable, the extent to which the individual meets the criteria for involuntary examination pursuant to section 394.463, F.S., or involuntary inpatient placement pursuant to section 394.467(1), F.S. Each member of the recovery team must provide a recommendation for disposition. Individuals with competency reported as non-restorable may be considered, as appropriate, for recommendations of release without legal conditions or involuntary examination or inpatient placement.²⁵

Competency Evaluation Report

Following the completion of the competency evaluation, the evaluation to examine suitability for involuntary placement, and consideration of restorability, the evaluator of competency must complete a competency evaluation report to the circuit court.²⁶ A competency evaluation report to the circuit court is a standardized mental health document that addresses relevant mental health issues and the individual's clinical status regarding competence to proceed. The report is completed, pursuant to section 916.13(2), F.S., and DCF Operating Procedure 155-19 (Evaluation and Reporting of Competency to Proceed).²⁷ The operating procedures provide guidelines for the format and minimal content that must be included in the report. Evaluators may add other relevant and appropriate

²² DCF Operating Procedures No. 155-13, *Mental Health and Substance Abuse: Incompetent to Proceed and Non-Restorable Status*, September 2021, at https://www.myflfamilies.com/sites/default/files/2022-12/cfop_155-13_incompetence_to_proceed_and_non-restorable_status.pdf (last visited March 13, 2023).

²³ A recovery team is an assigned group of individuals with specific responsibilities identified on the recovery plan including the resident, psychiatrist, guardian/guardian advocate (if resident has a guardian/guardian advocate), community case manager, family member and other treatment professionals commensurate with the resident's needs, goals, and preferences. DCF Operating Procedures No. 155-16, *Recovery Planning and Implementation in Mental Health Treatment Facilities*, May 16, 2019, at https://www.myflfamilies.com/sites/default/files/2022-12/cfop_155-16_recovery_planning_and_implementation_in_mental_health_treatment_facilities.pdf (last visited March 20, 2023).

²⁴ *Id.*

²⁵ Chapter 394, F.S., or *Mosher v. State*, 876 So. 2d 1230 (Fla. 1st DCA 2004).

²⁶ DCF's Operating Procedure 155-19, *Evaluation and Reporting of Competency to Proceed*, February 15, 2019, at https://www.myflfamilies.com/sites/default/files/2022-12/cfop_155-19_evaluation_and_reporting_of_competency_to_proceed.pdf (last visited March 20, 2023).

²⁷ *Id.*

information as necessary to report on the individual's status and needs.²⁸ The report must include the following:

- A description of mental, emotional, and behavioral disturbances;
- An explanation to support the opinion of incompetence to proceed;
- The rationale to support why the individual is unlikely to gain competence to proceed in the foreseeable future;
- A clinical opinion that the individual no longer meets the criteria for involuntary forensic commitment pursuant to Section 916.13, F.S.; and
- A recommendation whether the individual meets the criteria for involuntary examination pursuant to Section 394.463, F.S.

In order for a criminal court to order an involuntary Baker Act examination there must be sworn evidence that the defendant is believed to meet the Baker Act criteria. Reports from mental health treatment facilities, such as the competency evaluation report, provide the court with sufficient basis/evidence to enter an order for involuntary examination. These reports may be sworn upon request of the court.²⁹

A competency evaluation report is used in the process of a forensic commitment becoming a civil commitment. However, to be considered in a criminal court proceeding as evidence that the defendant meets Baker Act criteria, the report must be sworn. Currently, competency evaluation reports are not sworn.

Civil Commitment after of Non-Restorable Defendant

Civil commitment is initiated in accordance with Part I of Chapter 394, F.S., otherwise referred to as the "Baker Act." The procedures in Chapter 394, F.S., ensure the due process rights of a person are protected and require examination of a person believed to meet Baker Act criteria at a designated receiving facility.

If a non-restorable defendant is returned to court in accordance with ch. 916, F.S., the criminal court has authority to enter an order for involuntary Baker Act examination and the defendant is taken to the nearest receiving facility. If found to meet criteria, a separate civil case is opened and the criminal case may be dismissed.³⁰

Baker Act – Civil Commitment

The Baker Act was enacted in 1971 to revise the state's mental health commitment laws.³¹ The Baker Act provides legal procedures for mental health examination and treatment, including voluntary and involuntary examinations and treatment. The Baker Act also protects the rights of all individuals examined or treated for mental illness in Florida.³²

Involuntary Examination

Individuals suffering from an acute mental health crisis may require emergency treatment to stabilize their condition. Emergency mental health examination and stabilization services may be provided on a voluntary or involuntary basis.³³ An involuntary examination is required if there is reason to believe that the person has a mental illness and has, because of his or her mental illness, refused voluntary examination, is likely to refuse to care for him or herself, or cause harm to him or herself or others, in the near future.³⁴

²⁸ Id.

²⁹ DCF, *Agency Bill Analysis HB 201 (2023)*, p. 2 (on file with the House Children Families, & Seniors Subcommittee).

³⁰ Section 916.145, F.S.

³¹ Sections 394.451-394.47892, F.S.

³² Section 394.459, F.S.

³³ Sections 394.4625 and 394.463, F.S., respectively.

³⁴ S. 394.463(1), F.S.

An involuntary examination may be initiated by:

- A court entering an ex parte order stating that a person appears to meet the criteria for involuntary examination, based on sworn testimony;³⁵
- A law enforcement officer taking a person who appears to meet the criteria for involuntary examination into custody and delivering the person or having him or her delivered to a receiving facility for examination;³⁶ or
- A physician, clinical psychologist, psychiatric nurse, mental health counselor, marriage and family therapist, or clinical social worker executing a certificate 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, including a statement of the professional's observations supporting such conclusion.³⁷

Involuntary patients must be taken to either a public or a private facility that has been designated by DCF as a Baker Act receiving facility. The purpose of receiving facilities is to receive and hold, or refer, as appropriate, involuntary patients for mental health or substance abuse evaluation and to provide treatment or transportation to the appropriate service provider.³⁸

For an involuntary examination under the Baker Act, a receiving facility must examine an involuntary patient within 72 hours of arrival.³⁹ During that 72 hours, an involuntary patient must be examined by a physician or a clinical psychologist, or by a psychiatric nurse performing within the framework of an established protocol with a psychiatrist at a facility, to determine if the criteria for involuntary services are met.⁴⁰ If the patient is a minor, the examination must be initiated within 12 hours.⁴¹

Within that 72-hour examination period, or, if the 72 hours ends on a weekend or holiday, no later than the next business day, one of the following must happen:⁴²

- The patient must be released, unless he or she is charged with a crime, in which case law enforcement will assume custody;
- The patient must be released for voluntary outpatient treatment;
- The patient, unless charged with a crime, must give express and informed consent to a placement as a voluntary patient and admitted as a voluntary patient; or
- A petition for involuntary placement must be filed in circuit court for involuntary outpatient or inpatient treatment.

Effect of the Bill

Current law requires DCF to conduct a competency evaluation and submit a report to the circuit court, upon determination that a defendant will not, or is unlikely to, regain competency to proceed. The bill requires DCF to submit this report within 30 days of the determination. The bill also requires the report to be sworn and provided to counsel in addition to the court. Further, the bill establishes the minimum information that must be included in the competency evaluation report. The minimum reporting requirements are current DCF procedures in which the bill codifies into law.⁴³ The report must include, at a minimum, the following information regarding the defendant:

- A description of mental, emotional, and behavioral disturbances;
- An explanation to support the opinion of incompetency to proceed;
- The rationale to support why the defendant is unlikely to gain competence to proceed in the foreseeable future;

³⁵ Section 394.463(2)(a)1., F.S. Additionally, the order of the court must be made a part of the patient's clinical record.

³⁶ Section 394.463(2)(a)2., F.S. The officer must execute a written report detailing the circumstances under which the person was taken into custody, and the report must be made a part of the patient's clinical record.

³⁷ Section 394.463(2)(a)3., F.S. The report and certificate shall be made a part of the patient's clinical record

³⁸ S. 394.455(39), F.S. This term does not include a county jail.

³⁹ S. 394.463(2)(g), F.S.

⁴⁰ S. 394.463(2)(f), F.S.

⁴¹ S. 394.463(2)(g), F.S.

⁴² S. 394.463(2)(g), F.S.

⁴³ Id note 26.

- A clinical opinion regarding whether the defendant no longer meets the criteria for involuntary forensic commitment; and
- A recommendation on whether the defendant meets the criteria for involuntary examination pursuant to s. 394.463, F.S.

These provisions ensure that the appropriate report is submitted to the court to initiate the process of moving a forensic commitment to a civil commitment. They also ensure that all relevant information is received timely and that the court may react on the information in a timely manner.

The bill provides an effective date of July 1, 2023.

B. SECTION DIRECTORY:

Section 1: Amends s. 916.13, F.S., relating to involuntary commitment of defendant adjudicated incompetent.

Section 2: Provides an effective date of July 1, 2023.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Current law provides DCF with sufficient rulemaking authority to execute the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On April 17, 2023, the Health and Human Services Committee adopted an amendment and reported the bill favorable as a committee substitute. The amendment:

- Requires DCF to complete and submit a competency evaluation report to the circuit court within 30 days after the department determines that a defendant will not or is unlikely to regain competency to proceed.
- Requires a qualified professional, as defined by statute, to sign the report under penalty of perjury.
- Defines competency evaluation report and specifies the minimum information that must be included in the report.

This analysis is drafted to the committee substitute as passed by the Health and Human Services Committee.