

**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.)

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Prepared By: The Professional Staff of the Committee on Children, Families, and Elder Affairs

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BILL: SB 1854

INTRODUCER: Senator Farmer

SUBJECT: Defendants with a Traumatic Brain Injury

DATE: March 22, 2021

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Delia	Cox	CF	<b>Pre-meeting</b>
2.			CJ	
3.			AP	

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**I. Summary:**

SB 1854 directs the Agency for Persons with Disabilities (the APD) and the Department of Children and Families (the DCF) to create a diversion program for criminal defendants deemed incompetent to proceed due to a traumatic brain injury (TBI). The bill provides a definition for TBI and requires a TBI diversion program to be implemented within each judicial circuit in the state.

The bill directs court-appointed mental health experts to determine if a defendant has a TBI, and if so, whether they meet certain criteria for being deemed incompetent to proceed. The bill allows the court to require a hearing with expert testimony prior to committing a defendant to a TBI diversion program.

The bill specifies that defendants found incompetent to proceed due to a TBI must be committed to inpatient civil facilities and undergo evaluation-based treatment. The state attorney's office is required to dismiss charges against a defendant who successfully completes a TBI diversion program. The bill also requires the DCF to assist defendants with transitioning into long-term care partnership programs.

The bill may have an indeterminate, negative fiscal impact on the APD and the DCF due to a potential increase in the number of individuals committed to state-operated inpatient civil commitment facilities. See Section V. Fiscal Impact Statement.

The bill is effective July 1, 2021.

## II. Present Situation:

### Traumatic Brain Injury

A TBI is caused by a bump, blow or jolt to the head or a penetrating head injury that disrupts the normal function of the brain.<sup>1</sup> TBIs vary in terms of severity; mild TBI may cause headaches, fatigue, lethargy, dizziness, and lightheadedness,<sup>2</sup> while more serious TBI can result in the same signs and symptoms as mild TBI, as well as repeated nausea or vomiting, a persistent or worsening headache, seizures, numbness or weakness in the hands and feet, and loss of coordination.<sup>3</sup> Regardless of the severity of the TBI, it can have adverse effects on all aspects of social functioning, including employment, social relationships, independent living, functional status, and leisure activities.<sup>4</sup>

### *TBI and the Criminal Justice System*

Approximately 25-87% of incarcerated inmates reported sustaining at least one TBI, compared to 8% of the general population.<sup>5</sup> This discrepancy between populations suggests that individuals with TBIs are more susceptible to socially unacceptable behaviors, leading to an increase in the frequency of criminal behavior among such individuals.<sup>6</sup> Research suggests that because individuals with frontal lobe injury are shown to have difficulty altering future behavior based on past consequences, sentencing that emphasizes punishment will be less successful than sentencing that involves teaching alternative coping strategies.<sup>7</sup>

### Pre-trial Intervention in Criminal Cases

Pretrial intervention is available to defendants who are charged with a misdemeanor or third degree felony as a first offense or who have previously committed one nonviolent misdemeanor.<sup>8</sup>

Before a case may be transferred to another county, the following is required:

- Approval from the administrator of the pretrial intervention program, a victim, the state attorney, and the judge who presided at the initial first appearance of the defendant;
- Voluntary and written agreement from the defendant; and
- Knowing and intelligent waiver of speedy trial rights from the defendant during the term of diversion.<sup>9</sup>

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<sup>1</sup> The Centers for Disease Control and Prevention, *Basic Information about Traumatic Brain Injury and Concussion*, available at <http://www.cdc.gov/traumaticbraininjury/basics.html> (last visited March 19, 2021).

<sup>2</sup> Erin Bagalman, *Traumatic Brain Injury Among Veterans*, Congressional Research Service, Jan. 4, 2013, at p. 3, available at [http://www.ncsl.org/documents/statefed/health/TBI\\_Vets2013.pdf](http://www.ncsl.org/documents/statefed/health/TBI_Vets2013.pdf) (last visited March 19, 2021).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Maria E. St. Pierre, Rick Parente, *Not Guilty By Reason of Brain Injury: Perception of Guilty and Sentencing*, Applied Psychology in Criminal Justice, 2018, at p. 1, available at [http://dev.cjcenter.org/files/apcj/St%20Pierre%20-%20Not%20Guilty.pdf\\_1532553960.pdf](http://dev.cjcenter.org/files/apcj/St%20Pierre%20-%20Not%20Guilty.pdf_1532553960.pdf) (last visited March 18, 2021).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Section 948.08(1), F.S.

<sup>9</sup> Section 948.08 (2), F.S.

While a defendant is in the program, criminal charges remain pending; if the defendant fails to successfully complete the program, the program administrator may recommend further supervision or the state attorney may resume prosecution of the case.<sup>10</sup> The court may not appoint the public defender to represent an indigent offender released to the pretrial intervention program unless the offender's release is revoked and the offender is subject to imprisonment if convicted.<sup>11</sup> If the defendant successfully completes the program, the program administrator may recommend that charges be dismissed without prejudice.<sup>12</sup>

The purpose of pretrial intervention is to offer eligible defendants a sentencing alternative in the form of counseling, education, supervision, and medical and psychological treatment as appropriate.<sup>13</sup>

### **State Forensic System -- Mental Health Treatment for Criminal Defendants**

Chapter 916, F.S., governs the state forensic system, a network of state facilities and community services for persons with mental health issues involved with the criminal justice system. The forensic system serves defendants deemed incompetent to proceed or not guilty by reason of insanity. A defendant is deemed incompetent to proceed if he or she does not have sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding or if the defendant lacks both a rational and factual understanding of the proceedings against him or her.<sup>14</sup>

If a defendant is suspected of being incompetent, the court, defense counsel, or the State may file a motion to have the defendant's cognitive state assessed.<sup>15</sup> If the motion is granted, court-appointed experts will evaluate the defendant's cognitive state. The defendant's competency is then determined by the judge in a subsequent hearing.<sup>16</sup> If the defendant is found to be competent, the criminal proceeding resumes.<sup>17</sup> If the defendant is found to be incompetent to proceed, the proceeding may not resume unless competency is restored.<sup>18</sup>

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.

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<sup>10</sup> Section 948.08(3) and (4), F.S.

<sup>11</sup> *Id.*

<sup>12</sup> Section 948.08(5), F.S. If a case is dismissed without prejudice, the case can be refiled at a later time.

<sup>13</sup> Section 948.08(1), F.S.

<sup>14</sup> Section 916.12(1), F.S.

<sup>15</sup> Rule 3.210, Fla.R.Crim.P.

<sup>16</sup> *Id.*

<sup>17</sup> Rule 3.212, Fla.R.Crim.P.

<sup>18</sup> *Id.*

- Any other factor deemed relevant by the expert.<sup>19</sup>

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.<sup>20</sup>

Defendants may be adjudicated not guilty by reason of insanity pursuant to s. 916.15, F.S. The DCF must admit a defendant adjudicated not guilty by reason of insanity who is committed to the department<sup>21</sup> to an appropriate facility or program for treatment and must retain and treat the defendant.<sup>22</sup>

Offenders who are charged with a felony and deemed incompetent to proceed and offenders adjudicated not guilty by reason of insanity may be involuntarily committed to state civil<sup>23</sup> and forensic<sup>24</sup> treatment facilities by the circuit court,<sup>25, 26</sup> or in lieu of such commitment, may be released on conditional release by the circuit court if the person is not serving a prison sentence.<sup>27</sup>

### **Mental Health Treatment Facilities**

The DCF runs three mental health treatment facilities: the Florida State Hospital (FSH); the Northeast Florida State Hospital (NEFSH) and the North Florida Evaluation and Treatment Center (NFETC).<sup>28</sup>

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<sup>19</sup> Section 916.12(2), F.S.

<sup>20</sup> Section 916.12(4), F.S.

<sup>21</sup> The court may also order outpatient treatment at any other appropriate facility or service or discharge the defendant. Rule 3.217, Fla.R.Crim.P.

<sup>22</sup> Section 916.15(3), F.S.

<sup>23</sup> Section 916.106(4), F.S. A “civil facility” is defined as “a mental health facility established within the DCF or by contract with the 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.”

<sup>24</sup> Section 916.106(10), F.S. A “forensic facility” is defined as “a separate and secure facility established within the DCF or APD to service forensic clients. 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.”

<sup>25</sup> Section 916.106(5), F.S. “Court” is defined to mean the circuit court.

<sup>26</sup> Sections 916.13, 916.15, and 916.302, F.S.

<sup>27</sup> Sections 916.17(1), F.S.

<sup>28</sup> The DCF, *State Mental Health Treatment Facilities*, available at <https://www.myflfamilies.com/service-programs/mental-health/state-mental-health-treatment-facilities.shtml> (last visited March 19, 2021).

The FSH, located in Chattahoochee, Florida, is a state psychiatric hospital that provides civil and forensic services.<sup>29</sup> Forensic services for persons who are charged with a felony and have been found to be incompetent to proceed with their trial due to mental illness, or who have been acquitted of a felony by reason of insanity are governed by ss. 916.111 - 916.185, F.S.

The hospital's civil services are comprised of the following three units comprising a total of 490 beds:

- Civil Admissions evaluates and provides psychiatric services primarily for newly admitted acutely ill male and female civil residents between the ages of 18 and 64;
- Civil Transition Program serves civil residents and individuals previously in a forensic setting who no longer need that level of security and with court approval, may reside in a less restrictive civil environment; and
- Specialty Care Program serves a diverse population of individuals requiring mental health treatment and services, including civil and forensic step downs.<sup>30</sup>

The hospital's forensic services section evaluates and treats persons with felony charges who have been adjudicated incompetent to stand trial or not guilty by reason of insanity. Forensic services is comprised of the following two units;

- Forensic Admission is a maximum security facility that assesses new admissions, provides short-term treatment and competency restoration for defendants found incompetent to stand trial, and behavior stabilization for persons committed as not guilty by reason of insanity; and
- Forensic Central provides longer-term treatment and serves a seriously and persistently mentally ill population who are incompetent to proceed or not guilty by reason of insanity.<sup>31</sup>

The NEFSH, located in Macclenny, Florida, is a state psychiatric hospital that provides civil services.<sup>32</sup> The facility operates 633 beds and is the largest state-owned provider of psychiatric care and treatment to civilly committed individuals in Florida. Referrals are based upon community and regional priorities for admission.<sup>33</sup>

The NFETC, located in Gainesville, Florida, is an evaluation and treatment center for people with mental illnesses who are involved in the criminal justice system.<sup>34</sup> The center has 193 beds open for the evaluation and treatment of residents who have major mental disorders. These residents are either incompetent to proceed to trial or have been judged to be not guilty by reason of insanity.<sup>35</sup>

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<sup>29</sup> The DCF, *Florida State Hospital Services and Programs*, available at <https://www.myflfamilies.com/service-programs/mental-health/fsh/services-programs.shtml> (last visited March 19, 2021).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> The DCF, *State Mental Health Treatment Facilities North Florida Evaluation and Treatment Center, About the Center*, available at <http://www.myflfamilies.com/service-programs/mental-health/nefsh/about.shtml> (last visited March 19, 2021).

<sup>33</sup> *Id.*

<sup>34</sup> See <https://www.myflfamilies.com/service-programs/mental-health/nfetc/about.shtml> (last visited March 19, 2021).

<sup>35</sup> *Id.*

The APD operates the Sunland Center in Marianna, the Developmental Disabilities Defendant Program (DDDP) in Chattahoochee, and the Tacachale facility in Gainesville.<sup>36</sup> The DDDP is a 146 bed, co-ed, secure facility, located on the grounds of FSH in Chattahoochee, Florida.<sup>37</sup> DDDP is Florida's only admission facility for individuals charged with a felony crime and found to be incompetent to proceed to trial based on a developmental or intellectual disability.<sup>38</sup>

### III. Effect of Proposed Changes:

The bill creates s. 916.181, F.S., defining the term "traumatic brain injury" to mean "a disruption in the normal function of the brain which can be caused by a bump, blow, or jolt to the head or a penetrating head injury."

The bill directs the APD, along with the DCF, to develop a diversion program for criminal defendants with a TBI who are incompetent to proceed to trial. The diversion program must be implemented in each of the state's twenty judicial circuits.

The bill specifies that a defendant is considered incompetent to proceed if, due to a TBI, the defendant:

- Lacks sufficient present ability to consult with their attorney with a reasonable degree of rational understanding, or;
- Lacks a rational or factual understanding of the charges they face.

Under the bill, at least two mental health experts, appointed pursuant to s. 916.115, F.S., must determine whether a defendant has a TBI and, if so, whether they meet the aforementioned criteria for being deemed incompetent to proceed. The bill requires a defendant to be evaluated by a minimum of two court-appointed experts prior to commitment to a TBI diversion program. In instances where one expert deems a defendant incompetent to proceed and all parties stipulate to the finding of incompetence, the bill allows the court to either commit the defendant or, alternatively, appoint up to two additional experts to perform an evaluation. The bill allows the court to require a hearing with testimony from the experts prior to ordering commitment.

The bill specifies that defendants found incompetent to proceed due to a TBI must be committed to inpatient civil facilities and undergo evaluation-based treatment. The state attorney's office is required to dismiss charges against a defendant who successfully completes a TBI diversion program.

The bill also requires the DCF to assist defendants with transitioning into long-term care partnership programs under ch. 409.

The bill is effective July 1, 2021.

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<sup>36</sup> The APD, *About Sunland Center at Marianna*, available at <http://apd.myflorida.com/sunland/about.htm> (last visited March 19, 2021).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

The bill does not appear to require cities and counties to expend funds or limit their authority to raise revenue or receive state-shared revenues as specified by Article VII, Section 18 of the Florida Constitution.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The bill may have a negative fiscal impact on state-operated inpatient commitment treatment facilities who will be required to accept defendants deemed incompetent to proceed due to a TBI. The number of defendants and the cost to inpatient facilities of establishing and operating a TBI diversion program are both unknown, and as such the fiscal impact of the bill on these facilities is indeterminate.

The bill may also have a negative fiscal impact on the APD and the DCF by virtue of the requirement that the agencies establish and implement TBI diversion programs in each judicial circuit. The specific role of each agency in establishing and implementing such programs is not defined in the bill, and as such the fiscal impact to each agency is indeterminate.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The bill directs the APD and the DCF to establish and implement a TBI diversion program in each judicial circuit, however the bill is silent on the specific duties of each agency in doing so.

**VIII. Statutes Affected:**

This bill creates section 916.181 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.