

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 201 Criminal Defendants Adjudicated Incompetent to Proceed

**SPONSOR(S):** Maney

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

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			
3) Health & Human Services Committee			

### SUMMARY ANALYSIS

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. 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. If the defendant is found to be mentally competent, the criminal proceeding resumes. If the defendant is found to be mentally incompetent to proceed, the proceeding may not resume unless competency is restored.

Chapter 916, F.S., 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 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 circuit court, 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. The committing court retains jurisdiction over the defendant while the defendant is under involuntary commitment or conditional release.

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

- 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.

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. Those who are found to be non-restorable must be civilly committed or released. Civil commitment is initiated the criminal court enters 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.<sup>1</sup>

If DCF determines that a defendant will not or is unlikely to gain competence to proceed, the bill requires DCF to initiate a transfer evaluation to determine if the defendant meets the criteria for involuntary civil commitment. The bill also requires a copy of the transfer be provided to the court and counsel before initiating the transfer of the defendant back to the committing jurisdiction.

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

<sup>1</sup> Section.916.145, F.S.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### State Forensic System – Mental Health Treatment for Criminal Defendants

The Due Process Clause of the 14th Amendment prohibits the states from trying and convicting defendants who are incompetent to stand trial.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> If the defendant is found to be mentally competent, the criminal proceeding resumes.<sup>7</sup> If the defendant is found to be mentally incompetent to proceed, the proceeding may not resume unless competency is restored.<sup>8</sup>

##### Involuntary Commitment of Defendant Adjudicated Incompetent

Chapter 916, F.S., 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 illness<sup>9</sup> and offenders who are adjudicated not guilty by reason of insanity may be involuntarily committed to state civil<sup>10</sup> and forensic<sup>11</sup> treatment facilities by the circuit court,<sup>12</sup> or in lieu of such commitment, may be released on conditional release<sup>13</sup> by the circuit court if the person is not serving a prison sentence.<sup>14</sup> The committing court retains jurisdiction over the defendant while the defendant is under involuntary commitment or conditional release.<sup>15</sup>

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<sup>2</sup> *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).

<sup>3</sup> *Id.* See also Rule 3.210(a)(1), Fla.R.Crim.P.

<sup>4</sup> *Id.* See also s. 916.12, 916.3012, and 985.19, F.S.

<sup>5</sup> Rule 3.210, Fla.R.Crim.P.

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

<sup>7</sup> Rule 3.212, Fla.R.Crim.P.

<sup>8</sup> *Id.*

<sup>9</sup> "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.

<sup>10</sup> 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. 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.

<sup>11</sup> Section 916.106(10), F.S.

<sup>12</sup> Sections 916.13, 916.15, and 916.302, F.S.

<sup>13</sup> Conditional release is release into the community accompanied by outpatient care and treatment. Section 916.17, F.S.

<sup>14</sup> Section 916.17(1), F.S.

<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> A separate and secure facility means a security-grade building for the purposes 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.<sup>18</sup>

A court may only involuntarily commit a defendant adjudicated incompetent to proceed for treatment upon finding clear and convincing evidence that:<sup>19</sup>

- 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, the administrator at the commitment facility must submit a report to the court:<sup>20</sup>

- 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 to Proceed and Non-Restorable

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.<sup>21</sup> Those who are found to be non-restorable must be civilly committed or released.<sup>22</sup>

### *Non-Restorable Competency*

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<sup>16</sup> Section 916.106(4), F.S.

<sup>17</sup> 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.

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

<sup>19</sup> Section 916.13(1), F.S.

<sup>20</sup> Section 916.13(2), F.S.

<sup>21</sup> Section. 916.13(2)(b), F.S.

<sup>22</sup> *Mosher v. State*, 876 So.2d 1230 (Fla. 1stDCA 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.<sup>23</sup> 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 team coordinator that the individual's competency does not appear to be restorable.

The recovery team<sup>24</sup> is required to meet to consider the individual's restorability. However, prior to the team meeting an independent evaluation must be conducted to examine suitability for involuntary placement. Once the recovery team meets it must consider the following:<sup>25</sup>

- 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.<sup>26</sup>

### *Competency Evaluation Report*

Following the completion of the competency evaluation, the evaluator must complete a Competency Evaluation Report to the Circuit Court.<sup>27</sup> 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.

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<sup>23</sup> 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](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).

<sup>24</sup> 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. See *Id.* at note 24.

<sup>25</sup> *Id.* at note 24.

<sup>26</sup> Chapter 394, F.S. or *Mosher v. State*, 876 So. 2d 1230 (Fla. 1st DCA 2004).

<sup>27</sup> The a Competency Evaluation Report to the Circuit Court is required in DCF's Operating Procedure 155-19 (Evaluation and Reporting of Competency to Proceed). See *Id.* at note 24.

## *Civil Commitment after Determination 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 Chapter 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.<sup>28</sup>

### Baker Act

The Baker Act, was enacted in 1971 to revise the state’s mental health commitment laws.<sup>29</sup> The Act provides legal procedures for mental health examination and treatment, including voluntary and involuntary examinations and treatment. It additionally protects the rights of all individuals examined or treated for mental illness in Florida.<sup>30</sup> 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 involuntary examination, and is likely to refuse to care for him or herself or cause harm to him or herself or others in the near future.<sup>31</sup>

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.<sup>32</sup>

For an involuntary examination under the Baker Act, a receiving facility must examine an involuntary patient within 72 hours of arrival.<sup>33</sup> 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.<sup>34</sup> If the patient is a minor, the examination must be initiated within 12 hours.<sup>35</sup>

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:<sup>36</sup>

- 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.

### Transfer Evaluation

Current law prohibits a state treatment facility from admitting a civil patient unless he or she has undergone a transfer evaluation.<sup>37</sup> Transfer evaluation is the process by which a person is evaluated for

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<sup>28</sup> Section.916.145, F.S.

<sup>29</sup> Sections 394.451-394.47892, F.S.

<sup>30</sup> Section 394.459, F.S.

<sup>31</sup> S. 394.463(1), F.S.

<sup>32</sup> S. 394.455(39), F.S. This term does not include a county jail.

<sup>33</sup> S. 394.463(2)(g), F.S.

<sup>34</sup> S. 394.463(2)(f), F.S.

<sup>35</sup> S. 394.463(2)(g), F.S.

<sup>36</sup> S. 394.463(2)(g), F.S.

<sup>37</sup> S. 394.461(2), F.S.

appropriateness of placement in a treatment facility.<sup>38</sup> However, a transfer evaluation is not currently used in the process of forensic commitment becoming a civil commitment. This evaluation is typically used for transfers from community placement to state mental health treatment facility placement.

A community mental health center or clinic shall evaluate each person seeking voluntary admission to a state treatment facility and each person for whom involuntary placement in a state treatment facility is sought, to determine and document:

- Whether the person meets the statutory criteria for admission to a state treatment facility; and
- Whether there are appropriate more integrated and less restrictive mental health treatment resources available to meet the person's needs.

Following the evaluation, the community mental health center or clinic shall recommend the admission to a state treatment facility or, if criteria for involuntary placement are not met, to alternative treatment programs and shall document that recommendation by completing and signing the transfer evaluation.<sup>39</sup>

### **Effect of the Bill**

If DCF determines that a defendant will not or is unlikely to gain competence to proceed, the bill requires DCF to initiate a transfer evaluation to determine if the defendant meets the criteria for involuntary civil commitment. The bill also requires a copy of the transfer be provided to the court and counsel before initiating the transfer of the defendant back to the committing jurisdiction.

#### **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.

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<sup>38</sup> S. 394.455(48), F.S.

<sup>39</sup> Rule 65E-5.1301, F.A.C., and DCF Transfer Evaluation form CF-MH 3089.

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**