

ASSEMBLY BILL NO. 36—COMMITTEE ON JUDICIARY

(ON BEHALF OF THE DIVISION OF PUBLIC AND
BEHAVIORAL HEALTH OF THE DEPARTMENT
OF HEALTH AND HUMAN SERVICES)

PREFILED NOVEMBER 18, 2020

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to competency hearings
for certain criminal defendants. (BDR 14-294)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets ~~omitted material~~ is material to be omitted.

AN ACT relating to criminal procedure; revising certain procedures
governing competency hearings and the treatment of
certain criminal defendants; and providing other matters
properly relating thereto.

Legislative Counsel’s Digest:

Existing law provides that: (1) a person may not be tried or adjudged to punishment for a public offense while incompetent; and (2) any time after the arrest of a defendant, if doubt arises as to the competence of the defendant, the court must suspend the proceedings, the trial or the pronouncing of the judgment until the question of competence is determined. (NRS 178.400, 178.405) Existing law also provides that: (1) for a defendant who is accused of a felony or gross misdemeanor, the court must appoint two psychiatrists, two psychologists, or one psychiatrist and one psychologist, to examine the defendant; and (2) for a defendant who is accused of a misdemeanor, the court must appoint a psychiatric social worker, an advanced practice registered nurse who has certain psychiatric training and experience or other person who is especially qualified by the Division of Public and Behavioral Health of the Department of Health and Human Services, to examine the defendant. (NRS 178.415) **Section 1** of this bill requires the person appointed to examine a defendant who is accused of a misdemeanor to consider whether the defendant meets the criteria to be considered competent or incompetent and needs to be considered for involuntary commitment.

Existing law provides that: (1) if a defendant is found incompetent, and dangerous to himself or herself or to society and that commitment is required for a determination of the defendant’s ability to receive treatment to competency and to attain competence, the defendant must be committed for detention and treatment at



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a secure facility; and (2) the defendant must be held there until a court orders the defendant's release or until the defendant is returned for trial or judgment. If the court finds the defendant incompetent but not dangerous to himself or herself or to society, and finds that commitment is not required for a determination of the defendant's ability to receive treatment to competency and to attain competence, the defendant must undergo outpatient treatment, if beneficial. (NRS 178.425) Sections 2-5 of this bill establish a different procedure for a defendant who is charged with or convicted of a misdemeanor. Sections 2 and 5 of this bill provide that if a defendant who is charged with or convicted of a misdemeanor is found to be incompetent, the court must dismiss the charges against the defendant and order the defendant released unless a petition for involuntary commitment is filed within 10 days after the order of the court.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN
SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 178.415 is hereby amended to read as follows:

178.415 1. Except as otherwise provided in ~~this~~ subsection ~~1~~ 2, the court shall appoint two psychiatrists, two psychologists, or one psychiatrist and one psychologist to examine the defendant.

2. If the defendant is accused of a misdemeanor, the court of jurisdiction shall appoint a psychiatric social worker, advanced practice registered nurse who has the psychiatric training and experience prescribed by the State Board of Nursing pursuant to NRS 632.120 or other person who is especially qualified by the Division, to examine the defendant. *The person appointed to examine the defendant shall consider whether the defendant meets the criteria prescribed in this chapter to be considered competent or incompetent and needs to be considered for involuntary commitment pursuant to chapter 433A of NRS.*

~~1~~ 3. Except as otherwise provided in this subsection, at a hearing in open court, the court that orders the examination must receive the report of the examination. If a justice court orders the examination of a defendant who is charged with a gross misdemeanor or felony, the district court must receive the report of the examination.

~~1~~ 4. The court that receives the report of the examination shall permit counsel for both sides to examine the person or persons appointed to examine the defendant. The prosecuting attorney and the defendant may:

(a) Introduce other evidence including, without limitation, evidence related to treatment to competency and the possibility of ordering the involuntary administration of medication; and

(b) Cross-examine one another's witnesses.

~~1~~ 5. A prosecuting attorney may not seek an indictment of the defendant for any offense during the period in which the court is



1 considering whether the defendant is competent or incompetent
2 except upon application by the prosecuting attorney to the chief
3 judge of the district court, or his or her designee, and with leave of
4 the court. The prosecuting attorney must demonstrate that adequate
5 cause exists for the court to grant leave to seek an indictment on the
6 grounds that the availability or unavailability of a witness, or any
7 other objective factor, significantly impacts the ability of the State to
8 prosecute the matter in the absence of such leave. The prosecuting
9 attorney must give notice of an application made pursuant to this
10 subsection to the attorney for the defendant not less than 24 hours
11 before the hearing on the application.

12 ~~15.1~~ 6. The court that receives the report of the examination
13 shall then make and enter its finding of competence or
14 incompetence.

15 ~~16.1~~ 7. The court shall not appoint a person to provide a report
16 or an evaluation pursuant to this section, unless the person is
17 certified by the Division pursuant to NRS 178.417.

18 **Sec. 2.** NRS 178.425 is hereby amended to read as follows:

19 178.425 1. If the court finds ~~the~~ *a defendant who is*
20 *charged with or convicted of a gross misdemeanor or felony*
21 incompetent, and dangerous to himself or herself or to society and
22 that commitment is required for a determination of the defendant's
23 ability to receive treatment to competency and to attain competence,
24 the judge shall order the sheriff to convey the defendant forthwith,
25 together with a copy of the complaint, the commitment and the
26 physicians' certificate, if any, into the custody of the Administrator
27 or the Administrator's designee for detention and treatment at a
28 division facility that is secure. The order may include the
29 involuntary administration of medication if appropriate for treatment
30 to competency.

31 2. The defendant must be held in such custody until a court
32 orders the defendant's release or until the defendant is returned for
33 trial or judgment as provided in NRS 178.450, 178.455 and
34 178.460.

35 3. If the court finds ~~the~~ *a defendant who is charged with or*
36 *convicted of a gross misdemeanor or felony* incompetent but not
37 dangerous to himself or herself or to society, and finds that
38 commitment is not required for a determination of the defendant's
39 ability to receive treatment to competency and to attain competence,
40 the judge shall order the defendant to report to the Administrator or
41 the Administrator's designee as an outpatient for treatment, if it
42 might be beneficial, and for a determination of the defendant's
43 ability to receive treatment to competency and to attain competence.
44 The court may require the defendant to give bail for any periodic



appearances before the Administrator or the Administrator's designee.

4. *If the court finds a defendant who is charged with or convicted of a misdemeanor incompetent, the court shall dismiss the charges against the defendant and order the defendant released unless a petition for involuntary commitment pursuant to chapter 433A of NRS is filed within 10 days after the order of the court.*

5. Except as otherwise provided in ~~subsection 5,~~ **subsections 4 and 6**, proceedings against the defendant must be suspended until the Administrator or the Administrator's designee ~~for, if the defendant is charged with a misdemeanor, the judge~~ finds the defendant capable of standing trial or opposing pronouncement of judgment as provided in NRS 178.400.

~~5.~~ 6. Whenever the defendant has been found incompetent, with no substantial probability of attaining competency in the foreseeable future, and released from custody or from obligations as an outpatient pursuant to paragraph (d) of subsection 4 of NRS 178.460, the proceedings against the defendant which were suspended must be dismissed. No new charge arising out of the same circumstances may be brought except upon application by the prosecuting attorney to the chief judge of the district court, or his or her designee, and with leave of the court where:

(a) The State has a good faith belief, based on articulable facts, that the defendant has attained competency;

(b) The State has a compelling interest in bringing charges again; and

(c) The period, equal to the maximum time allowed by law for commencing a criminal action for the crime with which the defendant was charged, has not lapsed since the date of the alleged offense.

↪ The prosecuting attorney must give notice of an application made pursuant to this subsection to the attorney for the defendant not less than 24 hours before the hearing on the application.

~~6.~~ 7. If a defendant is found incompetent pursuant to this section, the court shall cause, within 5 business days after the finding, on a form prescribed by the Department of Public Safety, a record of that finding to be transmitted to the Central Repository for Nevada Records of Criminal History, along with a statement indicating that the record is being transmitted for inclusion in each appropriate database of the National Instant Criminal Background Check System.

~~7.~~ 8. As used in this section, "National Instant Criminal Background Check System" has the meaning ascribed to it in NRS 179A.062.



Sec. 3. NRS 178.450 is hereby amended to read as follows:

178.450 1. The Administrator or the Administrator's designee shall keep each defendant committed to custody under NRS 178.425 or 178.460 under observation and shall have each defendant who has been ordered to report to the Administrator as an outpatient under those sections evaluated periodically.

2. The Administrator or the Administrator's designee shall report in writing to a judge of the court which committed the person and the prosecuting attorney of the county or city to which the person may be returned for further court action whether, in his or her opinion, upon medical consultation, the defendant is of sufficient mentality to be able to understand the nature of the criminal charge against the defendant and, by reason thereof, is able to aid and assist counsel in the defense interposed upon the trial or against the pronouncement of the judgment thereafter. The Administrator or the Administrator's designee shall submit such a report ~~[, in the case of a person charged or convicted of a misdemeanor, within 3 months after the order for commitment or treatment and evaluation as an outpatient or for recommitment pursuant to paragraph (b) of subsection 4 of NRS 178.460, and at monthly intervals thereafter. In all other cases, the initial report must be submitted]~~ within 6 months after the order *for commitment or treatment and evaluation as an outpatient* and at 6-month intervals thereafter. If the opinion of the Administrator or the Administrator's designee is that the defendant is not of sufficient mentality to understand the nature of the charge against the defendant and assist in the defendant's own defense, the Administrator or the Administrator's designee shall also include in the report his or her opinion whether:

(a) There is a substantial probability that the defendant can receive treatment to competency and will attain competency to stand trial or receive pronouncement of judgment in the foreseeable future; and

(b) The defendant is at that time a danger to himself or herself or to society.

3. The report must contain:

(a) The name of the defendant and the county or city to which the defendant may be returned for further court action.

(b) The circumstances under which the defendant was committed to the custody of the Administrator or the Administrator's designee and the duration of the defendant's hospitalization, or the circumstances under which the defendant was ordered to report to the Administrator or the Administrator's designee as an outpatient.



Sec. 4. NRS 178.455 is hereby amended to read as follows:

178.455 1. ~~{Except as otherwise provided for persons charged with or convicted of a misdemeanor, the}~~ **The** Administrator or the Administrator's designee shall appoint a licensed psychiatrist and a licensed psychologist from the treatment team who is certified pursuant to NRS 178.417 to evaluate the defendant. The Administrator or the Administrator's designee shall also appoint a third evaluator who must be a licensed psychiatrist or psychologist, must be certified pursuant to NRS 178.417 and must not be a member of the treatment team. Upon the completion of the evaluation and treatment of the defendant, the Administrator or the Administrator's designee shall report to the court in writing his or her specific findings and opinion upon whether the person has the present ability to:

(a) Understand the nature of the offense charged;

(b) Understand the nature and purpose of the court proceedings; and

(c) Aid and assist the person's counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.

2. If the Administrator or the Administrator's designee finds that the person does not have the present ability pursuant to paragraph (a), (b) or (c) of subsection 1 to understand or to aid and assist counsel during the court proceedings, the Administrator or the Administrator's designee shall include in the written report the reasons for the finding and whether there is a substantial probability that the person can receive treatment to competency and will attain competency in the foreseeable future.

3. A copy of the report must be:

(a) Maintained by the Administrator or the Administrator's designee and incorporated in the medical record of the person; and

(b) Sent to the office of the district attorney and to the counsel for the outpatient or person committed.

~~{4. In the case of a person charged with or convicted of a misdemeanor, the judge shall, upon receipt of the report set forth in NRS 178.450 from the Administrator or the Administrator's designee:~~

~~—(a) Send a copy of the report by the Administrator or the Administrator's designee to the prosecuting attorney and to the defendant's counsel;~~

~~—(b) Hold a hearing, if one is requested within 10 days after the report is sent pursuant to paragraph (a), at which the attorneys may examine the Administrator or the Administrator's designee or the members of the defendant's treatment team on the determination of the report; and~~



~~—(c) Within 10 days after the hearing, if any, or 10 days after the report is sent if no hearing is requested, enter a finding of competence or incompetence in the manner set forth in subsection 4 of NRS 178.460.]~~

Sec. 5. NRS 178.460 is hereby amended to read as follows:

178.460 1. If requested by the district attorney or counsel for the defendant within 10 days after the report by the Administrator or the Administrator's designee is sent to them, the judge shall hold a hearing within 10 days after the request at which the district attorney and the defense counsel may examine the members of the treatment team on their report.

2. If the judge orders the appointment of a licensed psychiatrist or psychologist who is not employed by the Division to perform an additional evaluation and report concerning the defendant, the cost of the additional evaluation and report is a charge against the county.

3. Within 10 days after the hearing or 10 days after the report is sent, if no hearing is requested, the judge shall make and enter a finding of competence or incompetence, and if the judge finds the defendant to be incompetent:

(a) Whether there is substantial probability that the defendant can receive treatment to competency and will attain competency to stand trial or receive pronouncement of judgment in the foreseeable future; and

(b) Whether the defendant is at that time a danger to himself or herself or to society.

4. If the judge finds ~~the~~ a defendant ~~is~~ *who is charged with or convicted of a gross misdemeanor or felony*:

(a) Competent, the judge shall, within 10 days, forward the finding to the prosecuting attorney and counsel for the defendant. Upon receipt thereof, the prosecuting attorney shall notify the sheriff of the county or chief of police of the city that the defendant has been found competent and prearrange with the facility for the return of the defendant to that county or city for trial upon the offense there charged or the pronouncement of judgment, as the case may be.

(b) Incompetent, but there is a substantial probability that the defendant can receive treatment to competency and will attain competency to stand trial or receive pronouncement of judgment in the foreseeable future and finds that the defendant is dangerous to himself or herself or to society, the judge shall recommit the defendant and may order the involuntary administration of medication for the purpose of treatment to competency.

(c) Incompetent, but there is a substantial probability that the defendant can receive treatment to competency and will attain



competency to stand trial or receive pronouncement of judgment in the foreseeable future and finds that the defendant is not dangerous to himself or herself or to society, the judge shall order that the defendant remain an outpatient or be transferred to the status of an outpatient under the provisions of NRS 178.425.

(d) Incompetent, with no substantial probability of attaining competency in the foreseeable future, the judge shall order the defendant released from custody or, if the defendant is an outpatient, released from any obligations as an outpatient if, within 10 judicial days, the prosecuting attorney has not filed a motion pursuant to NRS 178.461 or if, within 10 judicial days, a petition is not filed to commit the person pursuant to NRS 433A.200. After the initial 10 judicial days, the person may remain an outpatient or in custody under the provisions of this chapter only as long as the motion or petition is pending unless the person is committed to the custody of the Administrator pursuant to NRS 178.461 or involuntarily committed pursuant to chapter 433A of NRS.

5. *If the court finds a defendant who is charged with or convicted of a misdemeanor incompetent, the court shall dismiss the charges and order the defendant released unless a petition for involuntary commitment pursuant to chapter 433A of NRS is filed within 10 days after the order of the court.*

6. Except as otherwise provided in subsections 4 and 7 of NRS 178.461, no person who is committed under the provisions of this chapter may be held in the custody of the Administrator or the Administrator's designee longer than the longest period of incarceration provided for the crime or crimes with which the person is charged or 10 years, whichever period is shorter. Upon expiration of the applicable period provided in this section, subsection 4 or 7 of NRS 178.461 or subsection 4 of NRS 178.463, the person must be returned to the committing court for a determination as to whether or not involuntary commitment pursuant to chapter 433A of NRS is required.

Sec. 6. NRS 178.461 is hereby amended to read as follows:

178.461 1. If the proceedings against a defendant who is charged with any category A felony or a category B felony listed in subsection 6 are dismissed pursuant to subsection ~~5~~ 6 of NRS 178.425, the prosecuting attorney may, within 10 judicial days after the dismissal, file a motion with the court for a hearing to determine whether to commit the person to the custody of the Administrator pursuant to subsection 3. Except as otherwise provided in subsection 2, the court shall hold the hearing within 10 judicial days after the motion is filed with the court.

2. If the prosecuting attorney files a motion pursuant to subsection 1, the prosecuting attorney shall, not later than the date



on which the prosecuting attorney files the motion, request from the Division a comprehensive risk assessment which indicates whether the person requires the level of security provided by a forensic facility. The Division shall provide the requested comprehensive risk assessment to the court, the prosecuting attorney and counsel for the person not later than three judicial days before the hearing. If the person was charged with any category A felony other than murder or sexual assault or a category B felony listed in subsection 6 and the comprehensive risk assessment indicates that the person does not require the level of security provided by a forensic facility, the court shall dismiss the motion.

3. At a hearing held pursuant to subsection 1, if the court finds by clear and convincing evidence that the person has a mental disorder, that the person is a danger to himself or herself or others and that the person's dangerousness is such that the person requires placement at a forensic facility, the court may order:

(a) The sheriff to take the person into protective custody and transport the person to a forensic facility; and

(b) That the person be committed to the custody of the Administrator and kept under observation until the person is eligible for conditional release pursuant to NRS 178.463 or until the maximum length of commitment described in subsection 4 or 7 has expired.

4. Except as otherwise provided in subsection 7, the length of commitment of a person pursuant to subsection 3 must not exceed 10 years, including any time that the person has been on conditional release pursuant to NRS 178.463.

5. At least once every 12 months, the court shall review the eligibility of the defendant for conditional release.

6. The provisions of subsection 1 apply to any of the following category B felonies:

- (a) Voluntary manslaughter pursuant to NRS 200.050;
- (b) Mayhem pursuant to NRS 200.280;
- (c) Kidnapping in the second degree pursuant to NRS 200.330;
- (d) Assault with a deadly weapon pursuant to NRS 200.471;
- (e) Battery with a deadly weapon pursuant to NRS 200.481;
- (f) Aggravated stalking pursuant to NRS 200.575;
- (g) First degree arson pursuant to NRS 205.010;
- (h) Residential burglary with a deadly weapon pursuant to NRS 205.060;
- (i) Invasion of the home with a deadly weapon pursuant to NRS 205.067;
- (j) Any category B felony involving the use of a firearm; and
- (k) Any attempt to commit a category A felony.



1 7. If a person is within 6 months of the maximum length of
2 commitment set forth in this subsection or subsection 4, as
3 applicable, and:

4 (a) Was charged with murder or sexual assault; and

5 (b) Was committed to the custody of the Administrator pursuant
6 to this subsection or subsection 3,

7 ↳ the Administrator may file a motion to request an extension of
8 the length of commitment for not more than 5 additional years.

9 8. The court may grant a motion for an extension of the length
10 of commitment pursuant to subsection 7 if, at a hearing conducted
11 on the motion, the court finds by clear and convincing evidence that
12 the person is a danger to himself or herself or others and that the
13 person's dangerousness is such that the person requires placement at
14 a forensic facility.

15 9. At a hearing conducted pursuant to subsection 8, a person
16 who is committed has the right to be represented by counsel. If the
17 person does not have counsel, the court shall appoint an attorney to
18 represent the person.

