

Second Regular Session
Seventy-third General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. 22-1024.01 Michael Dohr x4347

HOUSE BILL 22-1386

HOUSE SPONSORSHIP

Amabile and Soper,

SENATE SPONSORSHIP

Hansen and Gardner,

House Committees
Judiciary

Senate Committees

A BILL FOR AN ACT

101 CONCERNING MEASURES RELATED TO COMPETENCY TO PROCEED.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://leg.colorado.gov>.)

Under current law in a dispute over a defendant's competency, a party may request a second evaluation of the defendant. The bill requires that if a second evaluation is completed and restoration is ordered, the court shall make the second evaluation available to the department of human services (department).

The bill permits a defendant to be placed in the department's custody for an inpatient competency evaluation if the court finds the competency report provided by the department does not meet statutory

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters or bold & italic numbers indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

requirements.

For a defendant whose highest charge is a misdemeanor, with some exceptions, the bill requires the court to order outpatient restoration services and grant the defendant a personal recognizance bond unless the defendant meets certification criteria or the court finds by clear and convincing evidence that extraordinary circumstances exist that make release inappropriate and that inpatient restoration services are appropriate.

If the defendant is in custody and the recommendation is that inpatient restoration services are not clinically appropriate to restore the defendant to competency, the bill directs the court to consider releasing the defendant on bond. The bill limits outpatient restoration services to a defendant or juvenile who is a resident of Colorado and requires the services be provided in Colorado.

The bill eliminates the requirement to opine on whether there is a substantial probability that the defendant will be restored to competency and remain competent with the use of medication or not remain competent without the use of forced medication.

After the court has conducted at least 4 competency reviews, the bill requires the court to conduct a competency review every 91 days. The bill requires the court to dismiss the defendant's case if there is not a substantial probability that the defendant will be restored to competency in the reasonably foreseeable future.

Under current law when a court determines that an adult defendant is incompetent to proceed and orders the defendant to undergo restoration treatment, any claim of privilege or confidentiality by the defendant is deemed waived. The bill creates the same waiver for a juvenile defendant who is determined to be incompetent to proceed and is ordered to undergo restoration treatment. A court may order a restoration progress review hearing for a juvenile defendant at any time on the motion of any party or the court. The bill requires that when a court orders a restoration to competency evaluation for a juvenile that the evaluation be completed by the department.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, 16-8.5-103, **amend**
3 (4) as follows:

4 **16-8.5-103. Determination of competency to proceed.** (4) If a
5 party requests a second evaluation, any pending requests for a hearing
6 must be continued until the receipt of the second evaluation report. The

1 report of the expert conducting the second evaluation must be completed
2 and filed with the court within thirty-five days after the court order
3 allowing the second evaluation, unless the time period is extended by the
4 court for good cause. IF A SECOND EVALUATION IS COMPLETED AND
5 RESTORATION IS ULTIMATELY ORDERED, THEN THE COURT SHALL MAKE
6 THE SECONDEVALUATION AVAILABLE TO THE DEPARTMENT. If the second
7 evaluation is requested by the court, it must be paid for by the court.

8 **SECTION 2.** In Colorado Revised Statutes, 16-8.5-105, **amend**
9 (1)(b)(II) as follows:

10 **16-8.5-105. Evaluations, locations, time frames, and report.**

11 (1) (b) Notwithstanding the provisions of subsection (1)(a) of this
12 section, the court may order the defendant placed in the department's
13 custody for the time necessary to conduct the inpatient competency
14 evaluation if:

15 (II) The court finds that ~~an inadequate~~ THE competency evaluation
16 and report ~~has been completed~~ PROVIDED BY THE DEPARTMENT IS
17 INSUFFICIENT BECAUSE IT DOES NOT MEET STATUTORY REQUIREMENTS
18 PURSUANT TO SUBSECTION (5) OF THIS SECTION or that two or more
19 conflicting competency evaluations and reports have been completed; ~~and~~
20 ~~the court finds that an inpatient evaluation is necessary; or~~

21 **SECTION 3.** In Colorado Revised Statutes, 16-8.5-111, **amend**
22 (2)(b), (2)(d), (2)(f)(I), (2)(f)(II)(A), and (2)(h)(I)(B); and **add** (2)(i) as
23 follows:

24 **16-8.5-111. Procedure after determination of competency or**
25 **incompetency.** (2) If the final determination made pursuant to section
26 16-8.5-103 is that the defendant is incompetent to proceed, the court has
27 the following options:

1 (b) (I) If the defendant is on bond or summons, the court shall
2 order that restoration to competency take place on an outpatient basis,
3 unless the department recommends inpatient restoration services pursuant
4 to section 16-8.5-105 (5)(e)(II).

5 (II) FOR A DEFENDANT WHOSE HIGHEST CHARGE IS A
6 MISDEMEANOR, EXCEPT FOR THE MISDEMEANORS IDENTIFIED IN THIS
7 SUBSECTION (2)(b)(II), THE COURT SHALL ORDER OUTPATIENT
8 RESTORATION SERVICES AND SHALL GRANT THE DEFENDANT A PERSONAL
9 RECOGNIZANCE BOND, UNLESS THE DEFENDANT MEETS THE CERTIFICATION
10 CRITERIA PURSUANT TO ARTICLE 65 OF TITLE 27 OR THE COURT FINDS BY
11 CLEAR AND CONVINCING EVIDENCE THAT EXTRAORDINARY
12 CIRCUMSTANCES EXIST THAT MAKE RELEASE INAPPROPRIATE AND THAT
13 INPATIENT RESTORATION SERVICES ARE APPROPRIATE. THIS SUBSECTION
14 (2)(b)(II) DOES NOT APPLY TO THE FOLLOWING MISDEMEANORS:

15 (A) ASSAULT IN THE THIRD DEGREE, AS DESCRIBED IN SECTION
16 18-3-204;

17 (B) UNLAWFUL SEXUAL CONTACT, AS DESCRIBED IN SECTION
18 18-3-404;

19 (C) CHILD ABUSE, AS DESCRIBED IN SECTION 18-6-401 (7)(a)(V);

20 (D) ALL VIOLATIONS OF A PROTECTION ORDER, AS DESCRIBED IN
21 SECTION 18-6-803.5;

22 (E) MISDEMEANOR FAILURE TO REGISTER AS A SEX OFFENDER, AS
23 DESCRIBED IN SECTION 18-3-412.5;

24 (F) MISDEMEANOR INVASION OF PRIVACY FOR SEXUAL
25 GRATIFICATION, AS DESCRIBED IN SECTION 18-3-405.6;

26 (G) FALSE REPORTING OF AN EMERGENCY, AS DESCRIBED IN
27 SECTION 18-8-111; AND

1 (H) INTERFERENCE WITH A SCHOOL - CREDIBLE THREAT TO USE A
2 DEADLY WEAPON, AS DESCRIBED IN SECTION 18-9-109 (6).

3 ~~(H)~~ (III) (A) If the defendant is in custody and the
4 recommendation is ~~for outpatient restoration services~~ THAT INPATIENT
5 RESTORATION SERVICES ARE NOT CLINICALLY APPROPRIATE TO RESTORE
6 THE DEFENDANT TO COMPETENCY, the court shall consider the release of
7 the defendant on bond consistent with article 4 of this title 16 and the
8 Colorado rules of criminal procedure.

9 (B) As a condition of bond, the court shall order that the
10 restoration take place on an outpatient basis. Pursuant to section
11 27-60-105, the department, through the office of behavioral health, is the
12 entity responsible for the oversight of restoration education and
13 coordination of all competency restoration services. As a condition of
14 release for outpatient restoration services, the court may require pretrial
15 services, if available, to work with the department and the restoration
16 services provider under contract with the department to assist in securing
17 appropriate support and care management services, which may include
18 housing resources. The individual agency responsible for providing
19 outpatient restoration services for the defendant shall notify the court or
20 other designated agency within twenty-one days if restoration services
21 have not commenced.

22 (C) When the defendant is in custody on a misdemeanor, petty
23 offense, or traffic offense, the court, within seven days of the defendant
24 being found incompetent to proceed, shall set a hearing on bond. At the
25 bond hearing there is a presumption that the court shall order a personal
26 recognizance bond. If the court does not order a personal recognizance
27 bond and the defendant is committed for inpatient restoration, the court

1 ~~must~~ SHALL make findings of fact that extraordinary circumstances exist
2 to overcome the presumption of a release and the clinical
3 recommendation ~~for outpatient treatment~~ THAT INPATIENT RESTORATION
4 SERVICES ARE NOT APPROPRIATE by clear and convincing evidence.

5 (d) If the court has ordered outpatient restoration services and the
6 department determines that it is unable, within a reasonable time, to
7 provide restoration services on an outpatient basis, the department shall
8 notify the court within fourteen days after its determination, at which
9 point the court shall review the case and determine what interim mental
10 health services can be provided within the community by the department
11 or other community provider. IF A COURT LIAISON IS APPOINTED, the
12 department shall report to the court liaison every ~~ten~~ TWENTY-EIGHT days
13 thereafter concerning the availability of restoration services on an
14 outpatient basis.

15 (f) (I) If the court has ordered inpatient restoration services, the
16 department shall provide restoration services at an appropriate inpatient
17 restoration services program. On and after July 1, 2019, the department
18 shall offer tier 1 defendants admission for restoration services within
19 seven days after receipt of the court order and collateral materials. On and
20 after July 1, 2021, the department shall offer admission to tier 2
21 defendants within twenty-eight days after receipt of the court order and
22 collateral materials. For tier 2 defendants, the department shall advise the
23 court and, IF A COURT LIAISON IS APPOINTED, the court liaison every ~~ten~~
24 TWENTY-EIGHT days after the initial twenty-eight day period regarding the
25 availability of a bed and when admission will be offered.

26 (II) If the defendant is not offered admission and transported to
27 the inpatient restoration services program within the time frames provided

1 or in accordance with other court orders, the court may:

2 (A) Review the case for consideration of outpatient restoration
3 services and appropriate and necessary case management services
4 coordinated with the department; IF A COURT LIAISON IS APPOINTED, the
5 court liaison; and pretrial services, if available; or

6 (h) (I) If the defendant is receiving inpatient restoration services
7 and the executive director concludes that community-based restoration
8 services would be more clinically appropriate, the department shall:

9 (B) Provide to the court information regarding the appropriate
10 outpatient restoration services, developed in conjunction with the court
11 liaison, WHEN ASSIGNED, and the reasons why the defendant could be
12 properly restored to competency on an outpatient basis.

13 (i) A COURT MAY ONLY ORDER OUTPATIENT RESTORATION
14 SERVICES FOR A DEFENDANT WHO IS A RESIDENT OF COLORADO, AND THE
15 SERVICES MUST BE PROVIDED WITHIN THE STATE OF COLORADO.

16 **SECTION 4.** In Colorado Revised Statutes, 16-8.5-116, **amend**
17 (2)(a), (4), (5), (6) introductory portion, (7)(a)(III), (8)(a)(III), (9)(a), and
18 (10); and **repeal** (2)(b)(VI) as follows:

19 **16-8.5-116. Certification - reviews - termination of**
20 **proceedings - rules.** (2) (a) Within ninety-one days after the entry of the
21 court's order of commitment OR ORDER TO RECEIVE OUTPATIENT
22 RESTORATION, the court shall review the case of a defendant who has
23 been determined to be incompetent to proceed with regard to the
24 probability that the defendant will ~~eventually~~ be restored to competency
25 WITHIN THE REASONABLY FORESEEABLE FUTURE and with regard to the
26 justification for certification, ~~or~~ confinement, OR CONTINUED
27 RESTORATION TREATMENT. The review may be held in conjunction with

1 a restoration hearing held pursuant to section 16-8.5-113. However, if at
2 the review hearing, there is a request by the defendant for a restoration
3 hearing pursuant to section 16-8.5-113, the court shall set the restoration
4 hearing within thirty-five days after the request pursuant to the provisions
5 of section 16-8.5-113.

6 (b) On and after July 1, 2020, at least ten days before each review,
7 the individual or entity evaluating the defendant shall provide the court
8 with a report describing:

9 (VI) ~~Whether there is a substantial probability that the defendant~~
10 ~~will be restored to competency and remain competent with the use of~~
11 ~~medications or will not remain competent without the use of forced~~
12 ~~medication;~~

13 (4) After the fourth review, the court shall review the competency
14 of the defendant every ~~sixty-three~~ NINETY-ONE days until the defendant
15 is restored to competency or the court determines, based on available
16 evidence, that there is not a substantial probability that the defendant will
17 be restored to competency in the REASONABLY foreseeable future. ~~and in~~
18 ~~that case.~~ IF THE COURT DETERMINES BASED ON AVAILABLE EVIDENCE
19 THERE IS NOT A SUBSTANTIAL PROBABILITY THAT THE DEFENDANT WILL BE
20 RESTORED TO COMPETENCY IN THE REASONABLY FORESEEABLE FUTURE,
21 the court shall dismiss the case SUBJECT TO THE PROVISIONS OF
22 SUBSECTION (10) OF THIS SECTION.

23 (5) The court shall forward a copy of each report and summary
24 received pursuant to subsections (2), (3), and (4) of this section to the
25 county attorney or district attorney required to conduct proceedings
26 pursuant to section 27-65-111 (6) for the county in which the case is
27 pending and, WHEN A COURT LIAISON IS APPOINTED, to the court liaison.

1 (6) Notwithstanding the time periods provided in subsections (7),
2 (8), and (9) of this section and to ensure compliance with relevant
3 constitutional principles, for any offense for which the defendant ~~remains~~
4 ~~confined as a result of a determination of incompetency to proceed~~ IS
5 ORDERED TO RECEIVE COMPETENCY RESTORATION SERVICES IN AN
6 INPATIENT OR OUTPATIENT SETTING, if the court determines, based on
7 available evidence, that there is not a substantial probability that the
8 defendant will be restored to competency within the reasonably
9 foreseeable future, the court may order the defendant's release from
10 commitment pursuant to this article 8.5 through one or more of the
11 following means:

12 (7) At any review hearing held concerning the defendant's
13 competency to proceed, the court shall dismiss the charges against the
14 defendant and release the defendant from confinement, subject to the
15 provisions of subsection (10) of this section, if:

16 (a) The defendant:

17 (III) Has BEEN ORDERED TO RECEIVE AND received competency
18 restoration services while committed or otherwise confined for an
19 aggregate time of six months; and

20 (8) At any review hearing held concerning the defendant's
21 competency to proceed, the court shall dismiss the charges against the
22 defendant and release the defendant from confinement, subject to the
23 provisions of subsection (10) of this section, if:

24 (a) The defendant:

25 (III) Has BEEN ORDERED TO RECEIVE AND received competency
26 restoration services while committed or otherwise confined for an
27 aggregate time of one year; and

1 (9) If the defendant is charged with any other felony offense
2 except a class 1, 2, or 3 felony offense; a sex offense as defined in section
3 18-1.3-1003 (5); a crime of violence as defined in section 18-1.3-406 (2);
4 or a level 1 or level 2 drug felony, and has been committed to the custody
5 of the department or otherwise confined as a result of a determination of
6 incompetency to proceed, the following provisions apply:

7 (a) If the defendant has BEEN ORDERED TO RECEIVE AND HAS
8 received competency restoration services while committed or otherwise
9 confined for an aggregate time of two years and the court determines,
10 based on available evidence, that the defendant is not restored to
11 competency, then the court shall dismiss the charges against the
12 defendant, subject to the provisions of subsection (10) of this section,
13 unless any party objects to dismissal.

14 (10) Prior to the dismissal of charges pursuant to subsection (1),
15 (4), (6), (7), (8), or (9) of this section, the court shall identify whether the
16 defendant meets the requirements for certification pursuant to article 65
17 of title 27, or for the provision of services pursuant to article 10.5 of title
18 27, or whether the defendant will agree to a voluntary commitment. If the
19 court finds the requirements for certification or provision of services are
20 met or the defendant does not agree to a voluntary commitment, the court
21 may stay the dismissal for twenty-one days and notify the department and
22 county attorney or district attorney required to conduct proceedings
23 pursuant to section 27-65-111 (6) in the relevant jurisdiction of the
24 pending dismissal so as to provide the department and the county attorney
25 or district attorney with the opportunity to pursue certification
26 proceedings or the provision of necessary services.

27 **SECTION 5.** In Colorado Revised Statutes, **add** 19-2.5-701.5 and

1 19-2.5-703.5 as follows:

2 **19-2.5-701.5. Definitions.** AS USED IN THIS PART 7, UNLESS THE
3 CONTEXT OTHERWISE REQUIRES:

4 (1) "COMPETENCY EVALUATOR" MEANS AN INDIVIDUAL WITH THE
5 QUALIFICATIONS DESCRIBED IN SECTION 19-2.5-703 (4)(b).

6 (2) "DEPARTMENT" MEANS THE DEPARTMENT OF HUMAN SERVICES.

7 (3) "INITIAL COMPETENCY HEARING" MEANS A HEARING TO
8 DETERMINE WHETHER A JUVENILE IS COMPETENT TO PROCEED.

9 (4) "RESTORATION PROGRESS REVIEW HEARING" MEANS A
10 HEARING IN WHICH THE JUVENILE'S PROGRESS IN RESTORATION TO
11 COMPETENCY EDUCATION AND OTHER APPLICABLE SERVICES IS REVIEWED,
12 BASED ON RESTORATION EDUCATION AND TREATMENT RECORDS AND ANY
13 PRIOR COMPETENCY EVALUATION REPORTS.

14 (5) "RESTORATION TO COMPETENCY EVALUATION" MEANS AN
15 EVALUATION CONDUCTED BY AN EVALUATOR WITH QUALIFICATIONS
16 DESCRIBED IN SECTION 19-2.5-703 (4)(b) TO DETERMINE IF THE JUVENILE
17 HAS ACHIEVED OR BEEN RESTORED TO COMPETENCY.

18 **19-2.5-703.5. Waiver of privilege.** (1) WHEN THE COURT
19 DETERMINES THAT THE JUVENILE IS INCOMPETENT TO PROCEED AND
20 ORDERS THAT THE JUVENILE DEFENDANT UNDERGO RESTORATION
21 TREATMENT, ANY CLAIM BY THE JUVENILE OR LEGAL GUARDIAN AS
22 APPROPRIATE TO CONFIDENTIALITY OR PRIVILEGE IS DEEMED WAIVED, AND
23 THE DISTRICT ATTORNEY, THE DEFENSE ATTORNEY, AND THE COURT ARE
24 GRANTED ACCESS, WITHOUT WRITTEN CONSENT OF THE JUVENILE OR
25 FURTHER ORDER OF THE COURT, TO:

26 (a) REPORTS OF COMPETENCY AND RESTORATION TO COMPETENCY
27 EVALUATIONS, INCLUDING SECOND OPINION EVALUATIONS AND

1 RESTORATION EDUCATION REPORTS;

2 (b) INFORMATION AND DOCUMENTS RELATING TO THE
3 COMPETENCY EVALUATION THAT ARE CREATED BY, OBTAINED BY,
4 REVIEWED BY, OR RELIED ON BY AN EVALUATOR PERFORMING A
5 COURT-ORDERED EVALUATION; AND

6 (c) THE EVALUATOR, FOR THE PURPOSE OF DISCUSSING THE
7 COMPETENCY EVALUATION.

8 (2) UPON A REQUEST BY EITHER PARTY OR THE COURT FOR THE
9 INFORMATION DESCRIBED IN SUBSECTION (1) OF THIS SECTION, THE
10 EVALUATOR OR TREATMENT PROVIDER SHALL PROVIDE THE INFORMATION
11 FOR USE IN PREPARING FOR A HEARING ON COMPETENCY OR RESTORATION
12 AND FOR USE DURING SUCH A HEARING.

13 (3) AN EVALUATOR OR A FACILITY PROVIDING COMPETENCY
14 EVALUATION OR RESTORATION TREATMENT SERVICES PURSUANT TO A
15 COURT ORDER ISSUED PURSUANT TO THIS ARTICLE 2.5 SHALL PROVIDE,
16 PROCEDURAL INFORMATION TO THE COURT, DISTRICT ATTORNEY, OR
17 DEFENSE COUNSEL, CONCERNING THE JUVENILE'S LOCATION, THE
18 JUVENILE'S HOSPITAL OR FACILITY ADMISSION STATUS, THE STATUS OF
19 EVALUATION PROCEDURES, AND OTHER PROCEDURAL INFORMATION
20 RELEVANT TO THE CASE.

21 (4) NOTHING IN THIS SECTION LIMITS THE COURT'S ABILITY TO
22 ORDER THAT INFORMATION IN ADDITION TO THAT SET FORTH IN
23 SUBSECTIONS (1) AND (3) OF THIS SECTION BE PROVIDED TO THE
24 EVALUATOR, OR TO EITHER PARTY TO THE CASE, NOR DOES IT LIMIT THE
25 INFORMATION THAT IS AVAILABLE AFTER THE WRITTEN CONSENT OF THE
26 JUVENILE, PARENT, OR LEGAL GUARDIAN.

27 (5) THE COURT SHALL ORDER BOTH THE PROSECUTOR AND THE

1 JUVENILE'S COUNSEL TO EXCHANGE THE NAMES, ADDRESSES, REPORTS,
2 AND STATEMENTS OF EACH PHYSICIAN OR PSYCHOLOGIST WHO HAS
3 EXAMINED OR TREATED THE JUVENILE FOR COMPETENCY.

4 (6) EVIDENCE OBTAINED DURING A COMPETENCY EVALUATION OR
5 DURING TREATMENT RELATED TO THE JUVENILE'S COMPETENCY OR
6 INCOMPETENCY AND THE DETERMINATION AS TO THE JUVENILE'S
7 COMPETENCY OR INCOMPETENCY IS NOT ADMISSIBLE ON THE ISSUES
8 RAISED BY A PLEA OF NOT GUILTY.

9 **SECTION 6.** In Colorado Revised Statutes, 19-2.5-705, **amend**
10 **(1); and add (4) as follows:**

11 **19-2.5-705. Restoration progress review hearing and**
12 **restoration to competency hearing.** (1) ~~The court may order a~~
13 ~~restoration to competency hearing, as defined in section 19-2.5-102, at~~
14 ~~any time on its own motion, on motion of the prosecuting attorney, or on~~
15 ~~motion of the juvenile. The court shall order a restoration of competency~~
16 ~~hearing if a competency evaluator with the qualifications described in~~
17 ~~section 19-2.5-703 (4)(b) files a report certifying that the juvenile is~~
18 ~~competent to proceed~~ THE COURT MAY ORDER A RESTORATION PROGRESS
19 REVIEW HEARING AT ANY TIME ON ITS OWN MOTION OR ON MOTION OF THE
20 PROSECUTING ATTORNEY OR THE JUVENILE. IF, DURING A RESTORATION
21 PROGRESS REVIEW HEARING, THE COURT MAKES A DETERMINATION THAT
22 A RESTORATION TO COMPETENCY EVALUATION IS REQUIRED TO
23 DETERMINE WHETHER THE JUVENILE HAS BEEN RESTORED TO
24 COMPETENCY, THE COURT SHALL ORDER THAT SUCH AN EVALUATION BE
25 COMPLETED BY THE DEPARTMENT, AND THE COURT MAY ORDER A
26 RESTORATION TO COMPETENCY HEARING UPON RECEIPT OF THE
27 EVALUATION.

1 (4) A COURT MAY ONLY ORDER OUTPATIENT RESTORATION
2 SERVICES FOR A JUVENILE WHO IS A RESIDENT OF COLORADO, AND THE
3 SERVICES MUST BE PROVIDED WITHIN THE STATE OF COLORADO PURSUANT
4 TO SECTIONS 19-2.5-702 AND 19-2.5-704.

5 **SECTION 7. Safety clause.** The general assembly hereby finds,
6 determines, and declares that this act is necessary for the immediate
7 preservation of the public peace, health, or safety.